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A
GENERAL ABRIDGMENT
OF

Law and Equity,

ALPHABETICALLY DIGESTED UNDER
PROPER TITLES;

WITH NOTES AND REFERENCES
TO THE WHOLE.

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FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY
OF OXFORD.

FAVENTE DEO.

THE SECOND EDITION.

VOL. XIX.

London:

PRINTED FOR

G. G. J. AND J. ROBINSON, T. PAYNE, E. AND R. BROOKE,
J. BUTTERWORTH; AND L. WHITE, Dublin.

M. DCC. XCIII.

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Replevin.

(O. 3) Second Deliverance.

13 E. 1. cap. 2. **F**ORASMUCH as lords of fees distraining their tenants for services and customs due unto them are many times grieved, because their tenants do replevy the distress by writ or without writ,
S. 1. In this preamble is the mischief let down, that was at the common law before the making of this act. 2 Inst. 339. — The mirror without cause does find great fault with this act. 2 Inst. 339.

And when that lords, at the complaint of the tenants, do come by attachment into the county, or into * another court, having power to holds pleas of † Withernam and do avow the taking good and lawful, by reason that the tenants disavow to hold ought, nor do claim to hold any thing of him which took the distress, and avowed it, he that distrained is amerced, and the tenants go quit,
* So as lords of hundreds, wapentakes, &c. may have power to hold plea of replevin, &c. 2 Inst. 339. — † De vetito namio, of a forbidden or unjust taking, and is not understood of a taking in withernam; for that is a just, and no forbidden taking. 2 Inst. 339.

To whom punishment cannot be assigned for such * disavowing by record of the county, or of other courts having no record;
* That is disclaim, whereof the court being no court could have no consuance, because it concerned freehold. 2 Inst. 339.

S. 2. It is provided and ordained from henceforth, That where such lords * cannot obtain justice in counties, and such manner of courts against their tenants as soon as they shall be attached at the suit of their tenants, a writ shall be granted to them to † remove this plea before the Justices, before whom, and no otherwere [not elsewhere,] justice may be ministered unto such lords. And the cause shall be put in the writ, because such a man distrained in his fee for services and customs to him due.
See (W) pl. 3. — * Failure of justice is ever a good cause to remove the plea. 2 Inst. 339. — † Note, That replevin may be as

well removed into B. R. as into C. B. which appears twice the same year. Br. Replevin, pl. 67. cites 9 H. 7. 10.

The writ of pone lies when there is a replevin depending by writ out of the Chancery, the plaintiff or defendant may remove the plea by a † pone; and if the plea be depending in the county, the plaintiff may remove the same || without cause, but the defendant cannot remove it without cause, and that ** cause must be put in the end of the writ. And if it be upon this statute, the words be, quia prædict. B. cepit averia prædict. in feodo suo pro consuetudinibus et servitiis ut dicitur, which are the very express words of the act. 2 Inst. 339. — † S. P. And this writ is sued out of the Chancery. F. N. B. 69. (M) — || S. P. F. N. B. 69. (M) & 70. (A) and that the cause shewn by the defendant must be put after the teste of the writ. — F. N. B. 69. (M) in the new notes there (s) says, That the pone (at the defendant's suit) was pone loquelam, quæ est in com. tuo int. A. & B. de averiis ipsius A. capt. &c. and says, Præfatio B. where it should be præfat. A. Rolph came for A. the plaintiff in the replevin, and prayed damages, because otherwise he had

no remedy; for the pone is abateable, and so held the Court, being without warrant; and yet it shall not be remanded, because both are the king's courts; and a *new pone* does not lie in this case, because the plaint shall stand. Martin, Baker and Paston contra, That a pone or recordare is only to remove the plaint; so that when the plaint is removed, the pone or recordare is determined, and the Court shall hold plea on the plaint, and not on the writ of recordare; so that the pledges first found still remain, and the pone or recordare shall never abate; And for that the Court in this case is seised of the plaint, but the plaintiff has no day, the Court shall make a special writ to the sheriff, to warn the plaintiff to pursue his plaint. Et sic factum fuit. 3 H. 6. 2. a plaint is well removed, although the pone bears date before the plaint entered. 1 R. 3. 4. So if the plaint be removed by certiorari, where it ought to be pone or recordare. See 7 E. 4. 23. So if one plaint is removed where another ought to have been, *ibid.* or where there is a variance between the plaint and the writ. 6 E. 3. 55. 8 E. 3. 71. See 13 E. 1. Admeasurement, 17.——** But if the defendant will remove the plea in the county upon a replevin sued by writ, then he ought to put an evident cause in the writ after the teste of the writ. F. N. B. 70. (A)

But the cause may be traversable; for that both are the king's courts. F. N. B. 70. (A) in the new notes there (b)

And he may shew any cause which induces any favour that the sheriff doth, or is like to do unto the plaintiff. F. N. B. 70. (A)

And if a replevin be sued by writ in any other lord's court than in the king's court, then the plaint cannot be removed before the Justices by the plaintiff, nor by the defendant, without putting cause in the writ. F. N. B. 70. (A)

§ If the plaint be removed by the defendant by pone, at the day in bank the plaintiff shall be called on a nonsuit; and if he make default, a return shall be awarded, and no process; but if the plaintiff appears, and the defendant makes default, a distringas shall issue, and after that process of outlawry. But if the plaint be removed by pone or recordare by the plaintiff, there if he makes default it is a nonsuit, if the defendant pone per vad. and thereon issues a distringas, &c. and so process of outlawry. F. N. B. 70. (A) in the new notes there (b) [bis] cites 21 H. 6. 50.

When the plaint is in the county, by writ or without writ, or in the court of any other, the same may be removed by a writ of *recordari fac' loquelam*. 2 Inst. 339.

And if the plaint be in the county the plaintiff may remove the same without cause, as has been said; but the defendant cannot remove it (as has been said) without cause. *But if the plaint be in the court of any other*, neither the plaintiff nor defendant can remove the plaint without cause, for the prejudice that may come thereby to the lord. 2 Inst. 339.——When the plaint is in the county, and the replevin sued there without writ, the plaintiff may remove the plaint by recordare without any cause put in the writ; but the defendant must shew cause, as before is said, upon the pone. F. N. B. 70. (B)

Where beasts were taken in D. in the county of Berks, which was in the precinct of the honour of Wallingford, where the plaintiff had deliverance without writ; and the defendant sued a recordari to the sheriff of Berks quod distrinxerit in feodo, &c. and at the day the plaintiff came, but the defendant made default. It was adjudged, 1st, That the plaint was well removed, although the taking was in another county. 2dly, That process of outlawry does not lie in this case on the defendant's default, as it does in replevin. 3dly, That yet, if he comes in by process of outlawry, he shall be forced to answer. 4thly, That he may avow for damage feasant, notwithstanding the special cause assigned. Note, The beasts here were driven into the county of Berks. F. N. B. 70. (B) in the new notes there (a) cites Dyer 168. & 20 E. 3. 31.

Note, The words (ut dicitur) are to be in the writ when brought by a common person only, and not when brought by the king. F. N. B. 70. (B) in the new notes there (a) cites 38 E. 3. 31.

If the cause be removed by plea out of the lord's court, (it seems of ancient demesne) the cause is traversable. Contra, if it be out of the king's court. 12 H. 4. 12. & 31 E. 3. Fitzh. Cause de Remover, 10. and though there be no cause, yet the parol shall not be remanded. Contra, if in ancient demesne. 12 H. 4. 14. For on a recordari out of ancient demesne, the plea arises wholly on the cause, and therefore the plaintiff may be nonsuit in such recordare; but if it be out of any other court, the plea arises upon the mere matter, and therefore the plaintiff cannot be nonsuited there. F. N. B. 70. (B) in the new notes there (b) cites * Kelw. 115.——* Kelw. 115. 2. pl. 52. Casus incerti temporis. Anon.

§[2]

This must be understood without cause shewn; for

Neither is this act prejudicial to the law commonly used, which did not permit that any plea should be moved before Justices at the suit of the defendant;

by the common law, the defendant for cause shewn, might remove the plaint. 2 Inst. 339.

For though it appear in the 1st shew, That the tenant is plaintiff, and the lord defendant, nevertheless, having respect to that the lord has

*has distrained, and sues for services and customs being behind, he appears indeed to be * rather actor or plaintiff than defendant.* * In truth the defendant by making avowry does become actor, and shall have judgment given for him; and after avowry he shall not have a protection cast for him no more than a plaintiff shall, because he is become an actor, and not merely a defendant. 2 Inst. 339, 340.

And to the intent the Justices may know what fresh seisin the lords may avow the distress reasonable upon their tenants, from henceforth it is agreed and enacted, That a reasonable distress may be avowed upon the seisin of any ancestor or predecessor since the time that a writ of novel disseisin has run. And because it chanceth sometimes, that the tenant, after that he has replevied his beasts, doth sell or alien them, whereby return cannot be made unto the lord that distrained, if it be adjudged; It was a doubt before this act, within what limitation of time an avowry might be made; and by this act

it is provided, quod rationabilis districtio poterit advocari de seiscina antecessorum, vel predecessorum suorum a tempore quo breve novae disseiscinae currit; which limitation in an assise appears in W. 1. cap. 38. which was post primam transfretationem regis H. 3. in Vasconiam, in the 5th year of his reign. But this limitation, both in the assise and in the avowry, is altered by a * latter statute. 2 Inst. 340.—* See 32 H. 8. cap. 2.

*S. 3. It is provided, That sheriffs or bailiffs from henceforth shall * not only receive of the plaintiffs pledges for the pursuing of the suit before they † make deliverance of the distress, but also for the return of the beasts, if return be awarded.* [3]†
Sec(U)(W)
(X)—* If the sheriff return insufficient pledges, they

are no pledges within this statute; and in that case the sheriff shall be charged by this act as if he had taken no pledges at all. 2 Inst. 340.—S. P. Br. Parliament, pl. 3. cites 2 H. 6. 15.—Br. Scire facias, pl. 3. cites S. C.

If the return of the pledges be upon a writ of replevin, then if the plaintiff be nonsuit, &c. if upon the writ de retorno habendo, the sheriff returns averia elongata, &c. the plaintiff may have a writ to have return of the beasts of the pledges; but if the deliverance were by plaint, because in that case the pledges do not appear to the Court, the plaintiff can have no such writ. 2 Inst. 340.

And if upon the writ to have return of the beasts of the pledges, the sheriff return nihil, then may the plaintiff have a scire facias against the sheriff, quod reddat. ei tot. averia, or tot. catalla; and that which has been said of the sheriff is to be intended of the bailiff of a franchise. 2 Inst. 340.

In a replevin the sheriff does not return any pledges; and after issue joined, and found, it was moved, If they can be put in by the Court after verdict. And by the Court, That they may, notwithstanding the statute of W. 2. 2. For before that statute the Court might take pledges upon the omissions of the sheriff; but that diversity was agreed, between, 1st, Pledges of prosecuting; and those may be inserted at any time after, and then the sheriff cannot be punished. 3 H. 6. 3. 2dly, As well of prosecuting as return. habend. as now, and there by the common law; also the Court may take pledges for default of the sheriff, but then the sheriff shall be only amerced; but now by that statute a penalty is likewise given against the sheriff. But that statute does not take away the power of the Court to take pledges for default of the sheriff; for if the sheriff omit that, and the Court takes pledges, yet the party shall have his action against the sheriff upon that statute; and for that the taking of pledges now by the Court will not make the judgment erroneous. Noy 156. Trin. 4 Car. B. R. Anon.

And if any take pledges otherwise he shall answer for the price of the beasts, and the lord that distrains shall have his recovery by writ, that he shall restore unto him so many beasts or cattle. T. brought a scire facias against M. sheriff of Surry for

the returning of insufficient pledges in a replevin brought by one R. against the now plaintiff, in which the said R. made default; whereupon a return. habend. was awarded, an averia elongata returned, and then a withernam, and then a nihil, &c. And for this taking of insufficient pledges, this scire facias is brought upon Westm. 2. cap. 2. and the defendant demurred, and cites the like precedent. Hill. 21 Jac. Rot. 3563. between SOMMERFORD and BEAMONT. Hut. 77. Hill. 21 Jac. Rot. 3150. Trevors v. Michelborn.—3 Nelf. 2. 207. pl. 3. cites S. C. But it is said there, that upon demurrer judgment was had against the sheriff.

Though a replevin bond varies from this statute, yet it is not void. Gibb. 158. Mich. 4 Geo. 2. C. B. Lutwich v. Jamieson.

2 Inst. 340.
says, vide

44 E. 8. 13. 52 H. 3. the Statute of Exchequer & 2 H. 6. 10.

See (O) pl.

12, 13, 14
15.

* Here is a
maxim of
the com-

mon law implied, viz. *Judicia suum effectum habere debent; judicium non debet esse illusorium.*
2 Inst. 340, 341.

* The writ
of the se-
cond deli-
verance
given by this
act is a writ
judicial, as
here it ap-
pears, and
issues out of

the record of the replevin in which the nonsuit was, and regularly the judicial writ ought not to vary from the record out of which it issues; and therefore, if *after nonsuit the sheriff return averia elongata*, and the defendant upon the *withernam* has other beasts delivered to him, the plaintiff is to have his second deliverance of the first beasts mentioned in the former record. 2 Inst. 341.

Replevin was against a prior and his canon, and the second deliverance was against the prior and his commoigne, by which the Court said, That they should commence at this variance; and so see that the second deliverance is judicial and cannot vary. Br. Second Deliverance, pl. 9. cites 21 E. 3. 49.

[4]

* The effect
of the writ
of second
deliverance
is here set
down, and
appears in
Judicial Re-

gister. 2 Inst. 341. — And this writ is a *superfedeas* in law to the sheriff, that he make no return to the defendant upon the former nonsuit. 2 Inst. 341.

Replevin brought in the hundred court by plaint was removed into C. B. by recordari, and upon judgment given in C. B. error was assigned in B. R. because it did not appear that pledges were found upon the plaint, and cited 9 Rep. 71. *Hussey's Case*; and all the Court agreed, according to that case, That if upon the original writ pledges are not returned (because the writ commands, that if pledges be found, That then, &c. and the not finding them is to the king's disadvantage, as the loss of his fine) it is error; but whether it be so in this case was much doubted, because the sheriff may make replevin without finding pledges; and here the error is of the judgment in C. B. and it is no error in them; and perhaps pledges were found but not returned, and it is at the sheriff's peril if he does not take pledges according to the statute Westm. 2. cap. 2. Cro. C. 594. pl. 10. Mich. 16 Car. B. R. *Tregosc v. Wennel*. — Jo. 499. Trin. 15 Car. B. R. *Grosse v. Boscow* seems to be S. C. And the Court held, That there are two sorts of pledges, one *de prosequendo* at common law; and if those are not found the judgment is erroneous, and cites *Hussey's Case*; but that those may be found before the sheriff or in court any time before judgment, but not after; but pledges *de retorno habendo* are by the statute Westm. 2. cap. 2. and an action is given against the sheriff, if not found; but this makes not the proceedings erroneous. And of this opinion were all the Court; and says, That there was a like case between *Hicks and Heard*, and the same judgment given. — Mar. 46. pl. 72. Trin. 15 Car. Anon. seems to be S. C. And the whole Court agreed, That pledges may be found by this Court; for the pledges given by the statute of Westm. 2. are only to give remedy against the sheriff; and if the sheriff do not

Not his duty, but furceases, we may, as at the common law, put in pledges; and yet, notwithstanding, remedy may be against the sheriff upon the statute for his neglect. And farther it was agreed, That pledges may be found at any time before judgment, as in *Young and Young's Case*, and *Dr. Hussar's Case*, it was adjudged; and judgment was affirmed.

And if he that replevied make default again, or for another cause return of the distress be awarded, being now twice replevied, the distress shall remain irreplevisable.

If the plaintiff in the second deliverance be nonsuit, or

if the plea be discontinued, or the writ abate, or if he prevail not in his suit return irreplevisable shall be granted. 2 Inst. 341.

But if return irreplevisable be granted, the owner of the cattle or other goods distrained may come to the defendant, and offer the arrearages, &c. and if the defendant refuse to deliver the distress, the plaintiff may have an action of detain, and by that means recover them, for they are in nature of a gage. 2 Inst. 341.

But if a distress be taken of new, and for a new cause, the process aforesaid shall be observed in the same new distress.

The 2d deliverance must be

brought for the same distress, but if the same lord distrain the same tenant for a rent or other service behind at another day, or for another cause, there the replevin does lie, and such proceeding as is aforesaid. 2 Inst. 341.

2. In replevin the plaintiff after issue was nonsuited, and return awarded, and the plaintiff sued second deliverance, and at the pone per vadios the writ was not served; and the defendant prayed, that the plaintiff might count against him, because he had day in court by the roll though he had no day by the writ, and if the plaintiff has deliverance he will not count against the defendant. And per Wilby, you cannot sue to the sheriff to have the writ returned if the plaintiff will not; and if the sheriff has made deliverance and not returned the writ, you shall have remedy against the sheriff, by which he was put to sue *sicut alias*, &c. Br. Averment contra, &c. pl. 10. cites 21 E. 3. 43.

Br. Jours. pl. 25. cites S. C.

3. Where return is awarded by judgment the plaintiff shall not have other action but a second deliverance, which is by the statute West. 2. cap. 2. Br. Second Deliverance, pl. 11. cites 21 E. 4. 6.

If return is awarded in the second deliverance, this is irrepleviable

always. Per Cur. Br. Second Deliverance, pl. 11. cites 21 E. 4. 6.

4. Second deliverance is only a writ judicial depending upon the first original; quod nota. Br. Aid, pl. 147. cites 10 H. 7. 29.

[5]

5. Avowry was made for damage feasant in B. where the plaintiff in replevin had counted of a taking in C. and so were at issue upon the place, and it was found for the defendant, by which he had return; and yet the plaintiff had second deliverance by award, as well as if it had been upon nonsuit: for the statute West. 2. cap. 2. does not say more but that when return is awarded, he shall have it by writ, which shall command him, that he shall not make deliverance after without writ issuing out of the rolls, making mention of the judgment; and that if return be twice awarded, then at the second time this shall be irrepleviable. Br. Second Deliverance, pl. 8. cites 13 H. 7. & Fitzh. Return de Avers 27.

Br. Peremptory, pl. 82, cites S. C.

6. The statute of Westminster 2. cap. 3. gives writ of second deliverance out of the court where the first replevin was granted,

and a man cannot have it elsewhere; for if he may, then he shall vary from the place limited as to this by the statute. Per Saunders Ch. B. Pl. C. 206. b. Pasch. 2 Eliz. in the case of Stradling v. Morgan.

Hob. 80. pl.
105. S. C.
but not S. P.

• Sec (P. 3)

S. P. Per
Cur. Vent.
64. in the
case of Play-
ters v.
Sheering.

7. Error of a judgment in C. B. in a second deliverance, upon demurrer in pleading. The error assigned was, because there was *not any writ of second deliverance certified*, and in nullo est erratum being pleaded, it was moved not to be material, because it is *awarded on the roll, and the parties had appeared and pleaded to it*; but it was adjudged ill, and reversed for that cause; for there ought to be a writ, and if it * vary from the declaration in the replevin it shall be abated. Cro. J. 424. Pasch. 15 Jac. B. R. Newman v. Moor.

8. 17 Car. 2. 7. *has taken away the writ of second deliverance in avowry for rent*, but in all other cases is left as it was before. Introd. to Vidian's Entries.

9. In *replevin* the defendant avowed, and the plaintiff pleaded in bar to the avowry; and after issue joined and notice of trial, the plaintiff came into court and prayed that he might confess the avowry with a relicta verificatione, the which the Court thought to be reasonable, and gave rule to shew cause on the other side; upon which, at another day, it was objected, That this being in the discretion of the court, the court would not do it to the prejudice of the party, and this would be a *prejudice to the defendant*; for here, this being *upon a confession*, he could *not have costs upon the statute of 17 Car. 2.* as they might upon a nonsuit or demurrer; and likewise, it being by confession, the plaintiff might *have a second deliverance*; for return irrepleviable shall not be awarded upon the statute of West. 2. as it is held 34 E. 6. 37. And by this the defendant shall be without any fruit of his distress, for he may *bring second deliverance, and after confess the avowry, and so in infinitum*; and therefore the court would not admit him to confess the avowry. Then it was moved, That they might waive their plea and demurrer, in which case return irreplevisable ought to be awarded upon the statute of West. 2. sed non allocatur. After, by consent, he brought the money into court. Skin. 594. Mich. 7 W. 3. B. R. Anon.

10. Second deliverance is *given by the statute of W. 2. 2.* in lieu of a second replevin; for at common law, if the plaintiff in replevin had been nonsuited, he could have a *new replevin toties quoties*; but the statute in lieu thereof gives a second deliverance, which is a judicial writ of the court where the replevin was before brought; and if he is nonsuited in that, he is gone. And this was agreed to by all. 12 Mod. 547. Trin. 13 W. 3. B. R. Prat v. Rutleis.—cites 2 Inst. 340, 341. D. 41. b.

11. If second deliverance be *brought before returno habendo executed*, it shall *supersede* the execution, if *after* it is *executed*, it shall notwithstanding *fetch back the distress*. Per Holt Ch. J. 12 Mod. 547. Prat v. Rutleis.

(P) Second Deliverance. *How it shall be granted.*

Fol. 435.

[1. IF defendant in replevin has *return awarded upon nonsuit* of the plaintiff, by which he *sues a writ de returno habendo*; upon which writ the *sheriff returns averia elongata per querentem*, and upon this a *withernam* is awarded, and upon the *withernam* the *defendant has tot catalla to him delivered* of the goods of the plaintiff, and thereupon the plaintiff *sues a second deliverance*, he shall sue it *for the first distress taken, and not for the withernam*; and this appears by the nature and form of the writ of second deliverance. D. 36. H. 8. 59. 14.

The opinion of the Court (which was Shelley and Browne) was, that the second deliverance should be for the 1st distress, and not for the

withernam; and the Reporter adds, et sic oportet legem esse, si natura & formam brevis de secunda deliberatione consideretur. Ibid. S. C. Pasch. 36 & 37 H. 8.——Ibid. Marg. cites Pasch. 41 Eliz. C. B. SPILMAN's case; where, in the like case, the plaintiff prayed ad deliverance for the beasts taken in *withernam*; and Anderson held, that it lay; but the other justices held, that it did not lie by writ of 2d deliverance, but that a special writ ought to be sued; and that Scot the Prothonotary affirmed the same, and that there were precedents thereof.

F. N. B. 74. (A) in a N. B. in the new notes there (a) S. P. and says, quod nota; and yet the plaintiff himself, is possessed of the beasts, for which he complained; and if he makes his plaint or count of the beasts delivered in *withernam*, it is not good; and cites 25 E. 3. 47. 33 E. 3. Avowry 256. & 18 E. 3. Replevin 37. per Cur. and cites also D. 59. accordingly per Cur. in a 2d deliverance.——Kelw. 92. b. pl. 7. Trin. 22 H. 7. Anon.——D. 41. a. b. pl. 4. &c. Trin. 30 H. 8. S. P. Arnold v. Bingham.

(P. 2) Second Deliverance. *At what Time.*

1. SECOND deliverance may be sued *after withernam awarded to the defendant of the first distress, where it is returned, quod averia sunt elongata, viz. The second deliverance shall be of the beasts first taken by distress, and not of the beasts taken by withernam.* Br. Second Deliverance, pl. 10. cites 33 E. 3. & Fitzh. Avowry 256.

2. In replegiare the *plaintiff was nonsuit*, by which the *defendant had returno habendo*; the *sheriff returned, quod averia elongata sunt*, by which the *defendant had capias in withernam*, and the *plaintiff had second deliverance the same term, mesne between the issuing of the withernam and the return of it*, and both were returned served, and well. Per Fitzherbert & Cur. For if the plaintiff will pray the second deliverance, it shall be denied to him; quod nota. Br. Wythernam, pl. 14.

3. A *difference* was taken between the plaintiff in replevin's being *nonsuited* and *judgment's being against him upon nihil dicit*; for a judgment upon a nihil dicit is a final bar, and no second deliverance will ever lie after; but after nonsuit one may have a second deliverance. 12 Mod. 546. Trin. 13 W. 3. B. R. Prat v. Rutleis.

4. No second deliverance lies *after a judgment upon a demurrer, or after a verdict or confession of the avowry*; but in all these cases the *judgment must be entered with a return irreplevisable; but upon a nonsuit,*

a nonsuit, either before or after evidence, a writ of second deliverance will lie, because there is no determination of the matter; and there a writ of second deliverance lies to bring the matter into question: but in the case of a demurrer and verdict, the matter is determined by law; and in the case of a confession, it is determined by the confession of the party. 2 L. P. R. 457. cites Mich. 7 W. 3. B. R. See 2 Inst. 340, 341. and West. 2. c. 2.

[7] (P. 3) Variance between Replevin and Second Deliverance.

1. **I**N second deliverance, the plaintiff counted of a taking in another place than where he counted in the replevin: and yet good; and the defendant maintained the first place, and so they were at issue; quod nota. Br. Second Deliverance, pl. 13. cites 17 E. 2. and Fitzh. Replevin, pl. 22.

Br. Replevin, pl. 31. cites S. C.—
* The second deliverance is judicial, and cannot vary. Br. Second Deliverance, pl. 9. cites 31 E. 3. 49. See (O. 3) pl. 7.

2. Replevin of beasts taken in D. in a place called S. &c. the defendant said that he took them in D. in a place called F. and not in S. Prist; judgment of the writ, and made avowry to have return; and after the plaintiff was nonsuited, and then the plaintiff sued second deliverance of his beasts taken in D. in the place called W. and the defendant pleaded to the writ for the variance, inasmuch as the replevin was in D. in a place called S. and now he makes plaint in D. in a place called W. And per Vavisor, In the time of E. 3. and H. 5. it was suffered to vary in *second deliverance, if it agrees in substance, notwithstanding the opinion of Marten in 3 H. 6. and Brian agreed that he may vary. Br. Second Deliverance, pl. 7. cites 12 H. 7. 4.

3. And by him and Vavisor, if a man brings replevin, and counts of a taking in D. where the taking was in S. and he is nonsuited, he cannot have new replevin, and count of a taking in S. for the statute is, that in returno habendo upon a nonsuit, there shall be mention made that the sheriff shall not make deliverance nor replevin, without writ judicial, making mention of the first judgment, and the plaintiff in the second deliverance cannot vary from the first number, by them: and per Brian, the plaintiff cannot vary from the place, because the defendant in the replevin avowed in another place; but if they had agreed in the place at first, they cannot vary in the second deliverance. Br. Second Deliverance, pl. 7. cites 12 H. 7. 4.

Note, per opinionem Curie, that if a man brings replevin, and declares, and is nonsuited after declaration, so that certain

4. Replevin of a heifer, the parties were at issue upon claim of property, and the plaintiff was nonsuited, and after brought second deliverance of a cow; and good; per Fitzh. For it may be a heifer at the time of the caption, and a cow at the time of the second deliverance. And in second deliverance he may vary from the day and place; quod quære, and see 3 H. 6. And he may bring it of a lesser number, or of a greater than the replevin was, as in replevin of four beasts, the defendant avowed for six, the plaintiff

plaintiff is nonsuited, he may bring second deliverance of six. *ty may appear, and brings second deliverance, he cannot vary in it in year, day, place, nor number of beasts, &c.* *quod nota.*
 Per ipsum. Br. Second Deliverance, pl. 2. cites 26 H. 8. 7. ——— Br. Variance, pl. 2. cites S. C.

(P. 4) Withernam. What it is.

1. **T**HIS word is compounded of two old Saxon words, viz. *weder*, which common speech has turned to *oder*, or *otter*; and *naam*, that signifies a *caption*, or taking; and therefore is as much as a taking, or a *reprisal of other goods in lieu of them* that were formerly taken, and *eloigned* or *with-holden*; and this is *capere in withernam*; whereof the Register speaks and well expounds. 2 Inst. 141.

2. In *debt*; per Hank, where a bailiff or *sheriff takes beasts in withernam*, he shall not deliver them to the plaintiff, but shall retain them as a *pledge till the beasts first taken are re-delivered*; for the writ is *capias in withernam & detineas quousque*, &c. to which all the clerks of C. B. agreed; so that it shall not be delivered to the plaintiff. But it was said that *otherwise it is in B. R.* for there they shall be delivered to the plaintiff, &c. And this replevin in the principal case was in the county before the sheriff; *quod nota.* Br. Wythernam, pl. 3. cites 2 H. 4. 9.

3. When a defendant comes in upon a *capias* in withernam, and is *bailed*, that is but an easing of the custody he was in upon the *capias* till the matter be tried; and then if the issue be against him, he is, I think, to render himself in custody again, and then he is in by virtue of the *capias* in withernam. Per Holt Ch. J. 12 Mod. 428. Mich. 12 W. 3. in case of *More v. Wats.*

4. Withernam is only *mesne profits*, and not an execution. Grounded on an *elongata returned.* 12 Mod. 425. S. C.—S. P. And it cannot be an execution, because it is granted before judgment. Per Holt Ch. J. *Ld. Raym. Rep. 614.* S. C.

(Q) + Withernam. In what Cases, and when it shall be granted. And by what Court.

[1. **I**N replevin, if defendant claims property, upon which issues a writ *de proprietate probanda*, and sheriff returns that the property is to the plaintiff, and that the defendant has *eloigned the beasts*, a withernam shall be granted. 30 E. 3. 30.

*win by writ, and an alias and pluries, and upon the pluries the sheriff doth return, that the cattle or goods, &c. are eloigned, &c. by reason whereof he could not replevy them, &c. then this writ of withernam shall issue out of that court where the pluries is returned, returnable in B. R. * or C. B. F. N. B. 73. (E)*

* But not out of Chancery. F. N. B. 73. (E) in the new notes there (b) cites M. 42, 43 Eliz. inter *Grindal and Poundal*, in C. B.—And yet if *elongata* be returned on the *alias*, &c. into Chancery, then the withernam shall issue out of Chancery. *Ibid.* cites 22 H. 6. 21. Per Brown.

2. *Action upon the statute against him who distrained in the highway; and the defendant said that ne prist pas, and that he had*

See (T)
 † This writ lies where a man takes the cattle or goods of another man, and the party sues a replevin.

the cattle or goods of another man, and the party sues a replevin.

bad process of withernam before, which is not yet served, and prayed delivery in withernam. Per Cur. You shall never have any withernam, when the defendant denies the taking till the party be convicted. Br. Wythernam, pl. 16. cites Itin. Not. 3 E. 3. and 17 E. 3.

Br. Wythernam, pl. 2. cites 43 E. 3. 46. but it should be (26) and so are the other editions.

3 None shall have *delivery of the withernam* till the other has delivery of his beasts, and if the plaintiff have not his beasts, then he shall have deliverance of withernam, and also *process* against the party to recover his damages for the delay, and the beasts taken in withernam shall remain in the hands of the coroners till this writ be returned: quod mirum! &c. Br. Replevin, pl. 9. cites 43 E. 3. 26. Per Knivet.

4. In *recordare*, return was awarded for the defendant by default of the plaintiff, and the sheriff returned quod averia vendita sunt personis ignotis, & elongantur. Per Hull, the defendant may have withernam; per Ludd, no; for none shall have withernam but he who has property, and the defendant has only possession, and not property in the beasts taken by distress, which Brook says seems to be law. Br. Wythernam, pl. 7. cites 5 H. 4. 7.

[9]

5. In replevin, the defendant claimed property, and they were at issue upon the property; and because the plaintiff had the defendant's beasts in withernam upon the return of the sheriff, and the others were esloigned at the time of the issue, the plaintiff was compelled to gage deliverance of the withernam, and the defendant had writ to the sheriff for the deliverance of the beasts; the sheriff returned quod averia elongata sunt, by which withernam was awarded against the plaintiff, and the sheriff returned That he had no goods nor chattles. Br. Gage Deliverance, pl. 5. cites 11 H. 4. 10.

S. P. Br. Replevin, pl. 19. cites S. C.

6. In *homine replegiando*, if the sheriff returns the plaintiff esloigned withernam shall issue to take the body of the defendants, though some of them are peers of the realm. Br. Wythernam, pl. 6. cites 11 H. 4. 15.

If the sheriff upon the pluries returns quod prædict' B.

7. In replevin, if the sheriff can't make replevin, the plaintiff shall have a capias in Withernam. Br. Replevin, pl. 4. cites 9 H. 6. 42.

averia præd' A. cepit et ea sugavit de com' præd' in com' F. per quod ea eidem A. repl. non potuit, &c. the plaintiff shall have a writ of withernam to take as many of the defendant's cattle directed unto the sheriff. F. N. B. 68. (G)

8. Note, It lies not on a suggestion only, that the beasts are esloigned. F. N. B. 73. (E) in the new notes there (a) cites 11 H. 6. 1. per Cotton.

Br. Gage Deliverance, pl. 27. cites S. C.

9. Note, That as well the plaintiff as the defendant may have withernam. Br. Withernam, pl. 17. cites 13 H. 7. 28.

S. P. For it was returned before, that the plaintiff had esloigned the beasts of the

10. In replevin, the pluries was returned quod averia elongata, by which the plaintiff had withernam against the defendant, where the defendant appeared in court; which was error, by which superseas issued; but before this came to the sheriff, he returned, that he had delivered the defendants beasts to the plaintiff who had esloigned them, by which the defendant appeared, and pleaded ne prisi pas, and

and prayed withernam against the plaintiff; per Cur. they are your beasts if the plaintiff will not gage deliverance, quod nota. Br. Gage Deliverance, pl. 19. cites 7 E. 4. 17.

defendant;
and it seems
that withernam does
not lie till

it be returned, quod averia elongata sunt; Nota Br. Withernam, pl. 10. cites 7 E. 4. 15. S. C.

11. If the sheriff returns, *that after the taking, &c. the defendant has esloigned the cattle out of his bailiwick that he cannot deliver them; or, if he return, that the defendant has esloigned them into unknown places, that he cannot have view of them, to deliver them; or, if the sheriff return, that he sent unto the bailiff of the liberty, who answered him, That the defendant had impounded the cattle within the rectory of the church of C. for which cause he cannot deliver them, &c.* Upon these returns made by the sheriff, the plaintiff shall have a writ of withernam to take as many of the defendant's cattle, directed unto the sheriff. F. N. B. 68. (G)

12. Note, That in the writ of withernam, *the cause which the sheriff returned upon the pluries, &c. ought to be put, and rehearsed in the writ of withernam; and if the sheriff returns upon the pluries, that he has sent unto the bailiff of the liberty, and that he answers him that the beasts are esloigned, &c. then he shall have a withernam directed unto the sheriff, and the sheriff shall send his bailiff into the liberty to sue the withernam; and if the bailiff do not execution, nor give answer unto the sheriff of the precept directed unto him, then the plaintiff shall have a withernam directed unto the sheriff, with non omittas propter aliquam libertatem, &c. quin eam ingrediariis, &c. and to take the cattle in withernam, &c.* F. N. B. 69. (B)

13. It appears by the Register, if a man *sues a replevin in the county without writ, and the bailiff returns unto the sheriff that he cannot have view of the cattle to deliver them, then the sheriff by enquest of office ought to enquire thereof; and if it be found by the jury that the cattle are esloigned, &c. then the sheriff in the county-court may award a withernam to take the defendant's cattle; and if the sheriff will not award a withernam, then the plaintiff shall have a writ out of the Chancery directed unto the sheriff, rehearsing the whole matter, commanding him to award a withernam, &c. and he may have an alias, and after a pluries and attachment against the sheriff, if he will not execute the king's command, &c.* F. N. B. 69. (C)

*[16]
So if a man
distrain any
man's cat-
tle, and he
sues a reple-
vin by plaint
made unto
the sheriff,
for which
the sheriff
makes a pre-
cept unto
the bailiff
to replevy
them, and

the bailiff returns at the next county, that he cannot replevy the cattle, because they are esloigned, or that he cannot have view of the cattle; then the sheriff in the same county-court ought to make enquiry if it be true, which is returned, and if it be found so by the jury, then the sheriff ex officio shall make a precept unto his bailiff, in the nature of a withernam, to take as many cattle of the other party; and if the sheriff make such precept to take the other's cattle in withernam, and the bailiff will not execute the writ; then the party may have a special writ out of the Chancery, directed unto the sheriff, commanding him to make withernam, and to make execution of the first judgment. F. N. B. 74. (B)

14. If the sheriff returns upon the pluries repleg' that he has sent unto the bailiff of the liberty, who has return of writs, &c. and that the bailiff has given answer, *That he cannot execute the writ, because he cannot have a view of the cattle or goods which were taken; then the court in which such return is made shall award a writ*

S. P. Or if
the sheriff
return, that
he himself
cannot have
view of the
cattle to de-
writ

liver them, upon these returns the plaintiff shall have a writ of withernam directed to the sheriff to take as many of the defendant's cattle. F. N. B. 68. (G)

writ of withernam directed unto the sheriff, who shall thereupon make his precept unto the bailiff of the liberty; and if the bailiff of the liberty does not make a return thereof unto the sheriff, then the sheriff shall return the whole matter in court, and thereupon the court shall award a writ of withernam, and a non omittas with the same. F. N. B. 74. (A)

So in such case, if the defendant appears, and pleads that he did not distrain them; now the plaintiff shall not have withernam. And so it is if the defendant at the *pluries* returned appears, and pleads that the cattle are dead, in the default of the plaintiff, the plaintiff shall not have withernam. F. N. B. 74. (E)—[The last edition cites Bro. Vouch. cap. 7. but it seems misprinted, and Brook is not mentioned in the French original.]

15. In a replevin sued by writ, at the *pluries* returnable, the sheriff returns, *quod averia elongata sunt, &c.* Now if the defendant appears, the plaintiff shall not have a withernam, because the defendant may gage deliverance; and if the defendant's cattle be taken in withernam, they shall not be delivered to the plaintiff, but the sheriff shall keep them *quousque, &c.* And the same appears by the words of the writ; but it is said, That it is the usage in B. R. that they shall be delivered unto the plaintiff; by which it seems that the form of the writ of withernam there is in another manner than it is in the Register. F. N. B. 74. (D)

16. Wells was charged with having conveyed his elder brother away, and by that means enjoyed his estate, for which he was committed to Newgate without bail, as in withernam, till he produced his brother; and about a year afterwards he moved for an homine replegiando, which was denied for the reason before-mentioned; but the court being now as it were satisfied that W. was not guilty, granted a hab. corp. intending thereupon to bail him. Sid. 210. pl. 5. Trin. 16 Car. 2. B. R. The King v. Wells.

Where the party appears on the day, whereon the process is returnable, and pleads *non cepit*, there is no need of bail; wherefore per Cur. a superedeas to withernam was granted without bail. 12 Mod. 36. De la Bastille v. Reignold.—12 Mod. 425. Moore v. Watts.

17. If defendant appears on the *pluries* no withernam shall go; and where the defendant appears, and pleads *non cepi*, or claims property, there never ought to go a withernam; but that writ only goes where the thing cannot be replevied, and defendant will not come and plead. Per Holt Ch. J. 12 Mod. 427. Mich. 12, W. 3. B. R. in the case of Moore v. Watts.

If on *elongata* returned, the defendant pleads *non cepit*, no withernam shall issue. 2 Salk. 582. Moore v. Watts.—12 Mod. 425. S. C.—Kelw. 71. pl. 10. S. P. but adds a quere.

But if *non cepi* be pleaded, and found against him, judgment shall be, and withernam. Per Holt Ch. J. 12 Mod. 429. in the case of Moore v. Watts.

Holt Ch. J. thought the Court might award a second withernam. 12 Mod. 428. Moore v. Watts.—429.

18. There may be a new withernam after the defendant has been bailed upon the first. 2 Salk. 582. Moore v. Watts.

[11] (R) Withernam. Cattle, How to be used, and in what Cases, and on what Terms to be restored.

1. **I**N replevin, &c. the defendant avowed for damage-feasant, and upon issue joined it was found for the avewant, and damages.

damages assessed, and a *return. habend. issued*. The sheriff returned *averia elongata*, and thereupon a *capias* in withernam was awarded. The plaintiff came into court, and tendered the damages assessed by the jury, and prayed stay of the withernam, and threw the money into court; but the whole court was clear against it, because he ought to pay a fine for his contempt in eloining the cattle, and so they assessed a fine of 3s. and 4d. and then the plaintiff had his prayer. 2 Le. 174. pl. 211. Mich. 29 & 30 Eliz. C. B. Anon.

2. Upon a second deliverance, the sheriff returned *averia elongata*; whereupon he moved for a withernam of the cattle for the plaintiff, and it was granted; afterwards the plaintiff satisfied the defendant his damages and charges, and moved for a restitution of his cattle taken in withernam. The Court held the cattle were not replevisable, but having satisfied the damages, he shall have restitution of the cattle, and that so was the course which the clerks affirmed. And Walmley cited 16 H. 6. to this purpose; and as to being paid for the meat the cattle had eat, he said the defendant had the use of the cattle, and so it was reason he should sustain them; and a writ of restitution was granted. Ow. 46. Almesky v. Johnson. Cro. E. 162. pl. 1. S. C. Trin. 31 & 32 Eliz. C. B. accordingly by name of Annesly v. Johnson.— In such a case the Court granted the plaintiff a special writ of the cattle; 3 Le. 235. pl. 323. Mich. 32 Eliz. C. B. Anon.

3. It was said by the Court, That *beasts distrained, as cows, could not be milked, nor horses wrought*, but they ought to be put in the pound open, and there the owner might milk them and fodder them; but if cows be taken in withernam, because they are delivered to the party in lieu of his own cattle he may milk them, or if they be oxen or horses, he may reasonably work them, otherwise he should be at great charges of keeping and pasturing of them, and no profit or consideration for it. Anderson said it would be a great inconvenience to the commonwealth, For if the cows are not milked the milk is lost, and also the cows impaired thereby, Le. 220. pl. 302. Mich. 32 & 33 Eliz. C. B. Chamberlayn's Case.

(S) Withernam. Writ, Proceedings, Pleadings, and Judgment.

1. **I**N replevin the plaintiff had the beasts of the defendant in withernam, and the plaintiff was compelled to the deliverance thereof, and writ issued to the sheriff to make deliverance, and the sheriff returned, *quod elongata sunt*, by which the defendant had withernam against the plaintiff; *quod nota*; and so see withernam upon withernam; * and the sheriff returned *quod nulla habet bona nec catalla unde potest facere withernam*; by which *capias* issued, and the issue was found for the plaintiff, and damages taxed to 20 marks; and per Tirwhit, the defendant in this case ought to recover damages against the plaintiff for the detinue of the withernam, *quare inde*: but by the Reporter he cannot recover damages without

Br. Replevin, pl. 18, cites S.C.— F. N. B. 74. (A) in the new notes there (a) cites S. C. but says *quare* 1 Co. 75. [12]*

without original; and that he may have writ of detinue of the withernam; and also three capias's issued in the case supra against the plaintiff to deliver the withernam, and upon the pluries capias returned, exigent issued, and so see that the plaintiff may be outlawed, as here in his own suit. Br. Wythernam, pl. 5. cites 11 H. 4. 10.

Br. Wythernam, pl. 9. cites S. C.— 2. It was admitted that the *sheriff may award withernam in the county*. Br. Gage Deliverance, pl. 9. cites 21 H. 6. 40.

The *sheriff may award withernam on replevin sued by plaintiff, if it be found by enquest in the county that the cattle are esloigned according to the bailiff's return, &c.* But upon the withernam awarded in the county, if the bailiff do return that the other party has not any thing, &c. he shall have an alias and a pluries, and so infinite, and has no other remedy there. F. N. B. 74. (C).

3. In the writ of withernam he ought to rehearse the cause which the sheriff returns, for which he cannot replevy them. F. N. B. 73. (G)

4. But upon a withernam returned in B. R. or C. B. if the sheriff do return that the party has not any thing, &c. there a capias shall be awarded against him, and exigent, and process of utlagary. F. N. B. 74. (D)

5. F. N. B. 73. (F) in the new notes there (c) says, That it seems the defendant shall have a day in this writ, if he comes in by attachment, but not otherwise, and cites 7 H. 4. 27. 43 E. 3. 26. 35 H. 6. 47. As if elongata be returned on the pluries replevin, then there is this cause inserted in this writ. *Et si the plaintiff fecerit, &c. tunc pone the defendant, &c. ad respondend' tam domino regi de contemptu quam præfato querenti de captione & injusta detentione catallorum prædictor.* 2 Eliz. * 180. For it seems there had not been any such clause in the withernam, if it had been on a plaint in the county. Vide ibid. and 44 Ass. 15. But then the whole ought to be removed by the pone, and a special return thereof, viz. *Quod nullum aliud breve est, &c.*

• This is misprinted, and should be Mich. 2 & 3 Eliz. D. 188. b. pl. 22. Anon.

6. F. N. B. 74. (A) in the new notes there (a) says, Note the writ of withernam is *ad respond' domino regi de contempt' & parti de damno & injur'* and cites R. Entr. 701. and 35 H. 6. 47. Per Danby and Moyle. The defendant shall recover damages in withernam, on elongata returned, in a writ de retorno habend'; but others contra, and cited Dyer, 41. That if the plaintiff be nonsuit, he may have a second deliverance instant, and it shall be a supersedeas to the return' habend', and if a return' habend' be sued after a second deliverance granted, the sheriff ought not to execute the second deliverance. Note, this prevents the mischief of a withernam against the plaintiff.

(T) Process and Proceedings in Replevin.

S. P. Br. Process, pl. 198. cites 1 E. 3. 20.— But by 21 H. 1. I. IN replevin against two, the one avowed for himself, and justified for his companion, and the plaintiff prayed process against his companion, and could not have it; per Cur. For by this justification

ification of the other, he is out of court, nota. Br. Process, 6. 22. in replevin against two, pl. 26. cites 21 E. 3. 2. the one avowed, and the other justified *for coming in aid of him*, there notwithstanding they are at issue upon the avowry, the process shall be continued against the other, and otherwise the writ shall abate; for there the *other has pleaded of record*; quod nota. Br. Process, pl. 26.——Br. Brief, pl. 184. cites S. C. per Cur.——Br. Brief, pl. 437. cites S. C.

* 2. In replevin, at the alias and pluries the *sheriff did not make return*, by which writ issued to the coroners to attach the sheriff, and to make replevin returnable in B. R. and the coroners returned that they had attached the sheriff, and had not made replevin, because they cannot have the view of the beasts, and the sheriff did not come, by which writ issued to distrain the sheriff, and to make withernam to the plaintiff of the beasts of the defendant, and none came of the part of the plaintiff to receive the withernam, and in the writ to the coroners was not any summons to make the party to receive his beasts; and the defendant came and prayed that the plaintiff shall gage deliverance of the withernam, and said that part of the beasts are dead in the default of the plaintiff, and to the rest he is ready to make delivery. Holt said, that the plaintiff has not day in court here, wherefore he cannot plead with the defendant, therefore he prayed the withernam; for no process came to the coroners to give him day in court. Per Knivet, by the process made to the coroners, the sheriff cannot hold plea in the county, and the coroners have no power to hold plea; for the writ to them is only to make replevin, and attach the sheriff; and by reason of this process + the parties have day in court here; quod Ingilby concessit. Holt said, by process to the coroners the sheriff cannot make replevin, but his power remained to hold plea, and after Knivet awarded that the plaintiff shall find pledges to prosecute, and to make return if, &c. and writ to the coroners to make deliverance of the first beasts, and to attach the defendant, and upon the return of it, he may plead and recover his damages; and so it seems that they shall not have day in court by the first writ, and he shall recover his damages if the beasts are lost in default of the defendant; and the plaintiff prayed deliverance of the withernam, and could not have it: for per Knivet, none of them shall have delivery of the withernam till the other has deliverance of his beasts; and if the plaintiff has not his beasts then he shall have deliverance of the withernam, and also process against the party to recover his damages for the delay, and the beasts taken in withernam shall remain in the hands of the coroners till this writ be returned. Quod mirum! &c. Br. Replevin, pl. 9. cites 43 E. 3. 26.

3. An attachment against the sheriff to have a replevin directed to the coroners, and the sheriff returns the attachment & elongata for the beasts; whereupon a distringas against the sheriff, with a withernam issued, and he returns the distringas with a taking in withernam; and now comes the plaintiff, and prays a writ of deliverance of the beasts taken in withernam; and the defendant comes and prays that the plaintiff may gage deliverance of them, for that part of the beasts so taken were dead in pound, &c. and the residue he is ready to deliver; and because he had not part (ready) at the

Br. Replevin, pl. 53. cites S. C.—Br. Contempts, pl. 1. cites S. C.—Br. Wythernam, pl. 2. cites 43 E. 3. 46. [But it should be (26) and so are the other editions.—

+ Br. Jours, pl. 14. cites 43 E. 3. 26. S. P.

the day in court, the plaintiff was directed to sue a writ to the coroners to deliver the first beasts, and to attach the defendant to answer, and on the return thereof, the plaintiff might plead, &c. F. N. B. 68. (E) in the new notes there (d) cites 44 Aff. 15.

4. In second deliverance, the sheriff returned no writ, and the defendant appeared, and prayed that the plaintiff count against him, or that he may have return irrepleviable, and could not have it, but sicut alias; for it is a writ * judicial; and this notwithstanding they have day by the roll. Br. Second Deliverance, pl. 4. cites 49 E. 3. 2.

* Orig. (indice.)

But if he had avowed for himself and the others, there process

5. In replevin against three, the one appeared and avowed in another place to have return, and traversed the place; in this case process ought to be made against the other two by the best opinion. Br. Process, pl. 26. cites 49 E. 3. 30.

shall not be made against the others; contra here. Br. Process, pl. 26. cites 49 E. 3. 20.

Br. Wythernam, pl. 6. cites S. C.

[14]

6. In homine replegiando, the sheriff returned that the plaintiff is esloigned, and withernam issued to take the defendant, notwithstanding she was a peeress of the realm, and it issued against her and her servants who took the plaintiff; and this against the lady by reason of the contempt, viz. by capias. But in debt, and trespass against a lord or a peer, capias does not lie, contra upon contempt, as here; and after the lady produced the plaintiff who was put in ward of the marshal, and counted against the lady, and they were at issue upon villeinage or franktenement, and found surety to sue with effect; and against those defendants who came not, the plaintiff prayed capias, and could not have it now because the plaintiff is delivered, but had pone per vadios, &c. Br. Replevin, pl. 19. cites 11 H. 4. 15.

Br. Scire Facias, pl. 3. cites S. C.—
Br. Return de Avers, pl. 2. cites S. C.—
—Br. Parliament, pl. 3. cites S. C.—
—Br. Pledges, pl. 1. cites S. C.

7. Where the statute says, that the sheriff shall take pledges to have return in replevin, or shall render to the party all beasts, and all chattles, there upon insufficient pledges taken which is returned nihil, the party shall have scire facias against the sheriff, and shall not be put to action of detinue. Br. Process, pl. 5. cites 2 H. 6. 15.

Br. Replevin, pl. 4. cites S. C.—
Br. Return de Avers, pl. 4. cites S. C.

8. If the sheriff in replevin cannot have the view to make deliverance to the plaintiff, the plaintiff shall have capias in withernam, and for default of withernam, process of outlawry, and the lord shall be aided after return adjudged; if he cannot have return, he may have scire facias against the pledges, or attachment against the party, and for want of distress, process of outlawry or writ of detinue against the bailiff who made replevin without surety de returno habendo, &c. Quod vide in a note. Br. Wythernam, pl. 11. cites 9 H. 6. 42.

But where the plaint is removed out of the county at the suit

9. Plaint of replevin was removed out of C. B. by the defendant by pone, and at the day in bank, it was agreed that the defendant shall not have process of outlawry against the plaintiff in any case, and that if he who sued the pone makes default, distress shall issue, and

and for default of distress, process of outlawry. Br. Process, pl. 67. *of the plaintiff, and the defendant*
cites 21 H. 6. 50.

under default at the day, pone shall be awarded, which is an attachment, and after distress, and so upon the case of return process of outlawry, which is intended for default of distress as it seems. Ibid.

10. Note on the pluries, the parties have no day in court, but only the sheriff, yet he may return pledges on the pluries, or on the replevin, if it be found; and yet the plaintiff may come at the return of the pluries, and take issue on the cause returned by the sheriff, so as to intitle himself to damages against the sheriff, and the king to a fine for his contempt. But if at the return of the pluries, the plaintiff and also the defendant appear, they may plead, &c. And also (by Ashton) if the defendant appears, he may compel the plaintiff to count (*instantly*) although they have no day in court, and by the same reason may cause the plaintiff to be called upon a nonsuit. F. N. B. 68. (D) in the new notes there (b) cites 22 H. 6. 21: Bromfleet's Case. 2 H. 7. 5. *But the defendant, without doubt, is not compellable to come in at the day of the pluries; but if he does, he may plead with the plaintiff, and the plaintiff must find pledges in*

court instantly. Ibid. cites R. Entr. 560. b. ——— Where the plaintiff, at the day of the return of the pluries (if the writ be executed) may have an attachment against the defendant, *ad respondendum placito quare cepit averia, &c.* Ibid. cites R. Entr. 570. ——— Or if the sheriff returns *elongata*, then the plaintiff shall have a *withernam*, wherein is also contained an attachment against the defendant; and by the *withernam*, day is given to both parties; so that if the *withernam* be returned *tarde*, then the defendant at the day may compel the plaintiff to count; but otherwise it is if the *withernam* be not returned served, because then the parties have no day in court but by the roll; and therefore the plaintiff cannot be nonsuit, but may count. Ibid. cites 22 H. 6. 22. by Newton.

11. Issue shall not be taken whether the delivery be made or not, but writ shall issue to the sheriff to make the delivery; and thereupon if it be returned, *quod averia elongata sunt, capias* shall issue against the defendant, and not *withernam*, and the recovery shall be all in damages, and the defendant shall be grievously amerced. Br. Gage Deliverance, pl. 11. cites 22 H. 6. 41.

12. In avowry, the plaintiff was nonsuit, and return was awarded [15] to the defendant, and the sheriff returned upon the *retorno habendo*, *quod averia sunt elongata*, and upon this issued *withernam*, and the sheriff returned *nihil*, by which issued 3 *capias*'s and one *exigent*, and the plaintiff outlawed; *quod nota*, the plaintiff outlawed upon his own suit, in a manner, by which he sued a charter of pardon, and *scire facias* upon it: and there it was held, that where the defendant cannot recover damages upon the avowry, he shall not have damages upon the *withernam*. By the best opinion. Br. *Withernam*, pl. 1. cites 35 H. 6. 47.

13. The sheriff in his county may, upon complaint made to him of taking of beasts, make replevin immediately upon pledges found *de prosequendo & retorno inde habendo si, &c.* and shall not stay till the county-day; but the plaint shall be entered immediately, and the sheriff may enter it in his chamber or hall; for per Littleton, a man shall not be put to answer to any thing, if it be not in writing; and it would be mischievous to the party to stay for replevin till the county-day, but the pleas and the day thereof shall be in the county at the county-day, and the sheriff may make his precept

to the bailiff by parol to make deliverance, as well as by writing. Br. Replevin, pl. 28. cites 9 E. 4. 48.

14. Note per Littleton, that if the *defendant* in the replevin makes avowry, and after avowry refuses to make deliverance of the beasts, he shall be imprisoned for the contempt: for after avowry made by him he cannot claim property; and therefore always, because the plaintiff has property by common pretence, the defendant therefore shall be compelled to gage deliverance, or shall go to prison. Br. Gage Deliverance, pl. 24. cites 20 E. 4. 11.

Br. Return
de Brief,
pl. 100.
cites S. C.

15. In replevin at the *pluries* the sheriff returned, quod averia elongata sunt, by which issued withernam, and the sheriff returned quod defendant non habet bona nec catalla infra ballivam suam nec est inventus, &c. by which issued capias, and the sheriff returned quod cepit corpus, & quod languidus est in prisona, by which issued duces tecum, and the sheriff brought him in. Br. Withernam, pl. 13. cites 20 E. 4. 11.

16. In trespass the defendant justified as sheriff, because J. N. sued replevin, and he found the park, viz. the pound open, and entered and made deliverance, and the other said that the property of the beasts was to T. W. and not to J. N. and so to issue; and so see that the sheriff at the first replevin cannot break the park to make replevin, as it seems; but at the *pluries* he may break the forcelett, or hold, to make deliverance. Br. Replevin, pl. 58. cites 21 E. 4. 54.

17. A replevin is *viscontiel* by reason of this clause, et postea eam inde iuste deduci fac. But by the *pluries*, without question, the sheriff's power to proceed in the county-court is determined, as was clearly held by all. If the sheriff does not execute the writ, but returns elongata, it was doubted if the sheriff shall execute the writ, by reason the words (*vel ipse sit*) are conditional. F. N. B. 68. (D) in the new notes there (b) cites 2 H. 7. 5.

18. In replevin, if the beasts of the defendant are taken in withernam for non-delivery of the plaintiff's beasts, there at the day, each of them shall gage deliverance to the other, and shall find pledges severally of the deliverance, and each shall have several writ of deliverance; and it shall not be in one and the same writ; quod nota. Br. Gage Deliverance, pl. 27. cites 13 H. 7. 28.

19. Note, the original writ of repleg. is in nature of a justicies, and is not returnable, and in a justicies no conuance can be demanded. 2 Inst. 140.

*[16]

In a replevin in the county, the plaintiff doth not declare, and the avowant removes the cause to B. R. by recordare, and the plaintiff is nonsuited

20. A nonsuit was in replevin, where the plaintiff did not find pledges; but if the plaintiff has found pledges, and the sheriff on the attachment in the withernam returns that the defendant nihil, yet it seems he may come in by a day on the roll, and the plaintiff shall be called; * and if he be nonsuited, a special writ of delivery on the withernam shall be granted to the defendant, and a return of the beasts notwithstanding the return of the sheriff, if in truth the sheriff had made deliverance of them to the plaintiff or not, and so force the plaintiff to a second deliverance. F. N. B. 68. (D) in the new notes there (b) cites Dy. 189. And adds, Quere if

if the writ of second deliverance be not taken away by a late without
statute. declaring;
and the

doubt was, What judgment the avowant shall have? for if he shall have judgment to have a return of the cattle, it does not appear what cattle was replevied, because the plaintiff does not shew them by any declaration; and it seems the defendant shall suggest what cattle he took, and shall have return of them. Raym. 33. 34. Mich. 13 Car. 2. B. R. Anon.

In a replevin (*removed by recordari*) there was a nonsuit for want of a declaration; and thereupon the defendant made a suggestion, and took out a writ of inquiry upon 17 Car. 2. cap. 27. The plaintiff moved that this might be set aside, because the nonsuit happened through the sudden sickness of the person employed to prosecute. Curia. This new statute having taken away the writ of second deliverance, hath made the plaintiff remediless, unless we help him; therefore we will endeavour it as far as we can; and so ordered defendant to shew cause why he should not accept of a declaration upon payment of costs. Vent. 64. Hill. 21 & 22 Car. 2. B. R. Playters v. Sheering.

21. If the replevin was sued by writ, and the sheriff returns thereupon, that the cattle are not to be found, then a *withernam* shall be awarded against the defendant; and if a *nihil* be returned, then a *capias*, alias, and *pluries* withernam, and thereupon an *exigent*; and if at the return of the *exigent*, he finds pledges to make deliverance, and be admitted to his fine, then the plaintiff shall declare upon an *adhuc detinet*, and go to trial upon the right of the cause of distress: and if it be found for the plaintiff, he shall recover his costs and damages; and if for the defendant, he shall have a *retorno habendo*; but if upon the return of the *pluries* repleg. the defendant appear, then no *withernam* lies, but he must gage deliverance, or be committed; and the plaintiff shall count against him upon an *adhuc detinet*, and so proceed to the rightful taking of the distress. And if it be found for the plaintiff, if the cattle be not delivered, he shall recover the value of the goods, and costs and damages; if for the defendant, costs and damages, and a *return. habend.* 1 Brownl. 168.

22. Plaintiff nonsuited in replevin, defendant has a writ of return, and to enquire of damages, and the plaintiff brings second deliverance, per Cur. This is a *superfedeas* to the return, but not to the writ of inquiry. Lat. 72.

Goldsb.
185. pl. 4
126. S. P.—
S. P. D.
41. b. pl. 4.
Trin. 30 H.
8. Arnold

v. Bingham—Palm. 403.—1 Salk. 95. Pratt v. Rutledge; and says these damages are not for the things avowed for, but are given by 21 H. 8. 19. as a compensation for the expence and trouble the avowant has undergone.—Whether a second deliverance be a *superfedeas* of a writ of inquiry. Quere. See 12 Mod. 546. Prat v. Ruleis.

23. Replevin was brought against two defendants; one pleads *non cepit*, the other pleads that it was his freehold. The plaintiff is nonsuit against one, and gets a verdict against the other. Resolved, that the nonsuit against one before judgment, discharges both. Freem. Rep. 50. pl. 60. Mich. 1672. C. B. Beale v. Baldwin and Broadway; and cited Hob. 70. 180.

24. Holt Ch. J. said they should have the writ in court, and be ready to declare; for they were *demandable* at the return-day in *homine replegiando*, and in replevin for cattle, as well as upon an appeal. 12 Mod. 429. Mich. 12 W. 3. B. R. in case of More v. Wats.

25. The Court was of opinion, that notice ought to be given in replevin of the filing the *re. fa. lo.* if brought in after the 4 days, and that a declaration ought to be called for in writing, and there-

fore

fore set aside the retorn' habend. which had been issued in this cause without such notice. Rep. of Pract. in C. B. 55. Mich. 3 Geo. 2. Taylor v. Blaxland & al.—And adds, note, Coleman v. Poynter, Easter, 4 Geo. 2. the like resolution by the Court.

See (O. 3.)
pl. 1. S. 3.
Error (F. c.)
pl. 17, 18,
19. See
Pledges (H)
and thro'
that title.
*S. P. Br.
Retorne de Avers, pl. 14. cites S. C.

***(U) Finding Pledges in Replevin, and by whom taken.**

I. **I**N *homine replegiando* the plaintiff shall find surety in a sum to the use of the defendant to sue with effect before his deliverance. Br. Surety, pl. 24. cites † 8 H. 4. 21.

Br. Gage
Deliver-
ance, pl. 18.
cites S. C.

2. Where the defendant in *homine replegiando* pending the issue of villeinage has writ against the defendant to gage deliverance of the goods of the plaintiff taken, he shall have them without surety found to restore them to the defendant if the issue pass against him; quod nota. Br. Surety, pl. 18. cites 6 E. 4. 8.

Br. Retorne
de Avers,
pl. 29. cites
S. C.—Br.
Replevin,
pl. 66. cites
S. C.

3. In *homine replegiande* the defendant said, That the plaintiff was his villein, and the other said, That frank, &c. and the plaintiff found surety to sue with effect, and that he shall be ready to deliver the goods and body to the defendant if the issue pass against him, and had writ to have his goods in the mean time, and shall make bill of parcel of the goods; and by the Reporter the defendant shall have answer thereto that he has them not, or has not so many of them; quære, and that if the goods are wasted, that he shall make agreement with him. Br. Surety, pl. 27. cites 5 H. 7. 3.

4. Where the sheriff makes deliverance in replevin, he shall take sureties *pro retorno habendo*, if &c. But where the Court makes deliverance by *gager de deliverance*, or the plaintiff counts, quod adhuc detinet averia, there the Court shall take sureties; note the diversity. Br. Surety, pl. 15. per tot. Cur. cites 15 H. 7. 9.

5. The sheriff ought to take 2 kind of pledges, one by the common law, and they be *plegii de prosequendo*, and another by the statute, viz. *Plegii de retorno habendo*. Co. Litt. 145. b.

6. At the *pluries replegiare* the sheriff returned *averia elongata*, and that he received no other writ, thereupon the plaintiff had a *capias in withernam*, and the sheriff returned the *withernam*, viz. That the plaintiff had found pledges to prosecute and to return si, &c. and that he took 6 beasts of the defendant's, which he delivered to the plaintiff in *withernam* to keep *quousque*, &c. and that the defendant nothing had whereby to be attached. Afterwards both parties appeared by attorney, and the plaintiff declared for the taking, and yet detaining the cattle, and the defendant claimed property, and they were at issue upon the property. The defendant did not gage deliverance, but the plaintiff was compelled to do it of the *withernam*. D. 188. b. pl. 12. 189. a. pl. 14. Mich. 2 and 3 Eliz. Anon.

7. If

7. If the defendant *appear on the pluries homine replegiando*, and plead *non cepi*, he shall not need to give bail; but if he comes upon the *withernam*, he may plead *non cepi*, but must give bail, which is in the nature of gaging deliverance, and cites 12 Ed. 4. 4. Upon a *non cepi* on the return of the replevin, the defendant is in court without bail; but if he comes in custody there must be bail, the words of the book are, He must continue in custody, and that is in bail; and here, because he could not be bailed before plea, and that he could not plead before a declaration, which could not be till the writ was returned; it was offered for the defendant to accept a declaration as of the return of the writ, but denied. Per Holt Ch. J. 12 Mod. 425, 426. Mich. 12 W. 3. B. R. in the case of *More v. Watts*.

8. Holt Ch. J. said, He must plead a *non cepi in person* in court, and the bail must be in a *sum certain*, and in the nature of gaging deliverance, viz. that the defendant shall appear *de die in diem* till judgment; and in case return be awarded, that he shall restore the party to his liberty, and pay all costs and damages, or surrender his body to prison. 12 Mod. 426. in the case of *More v. Watts*.

[18]

(W) Pledges. Liable in what Cases.

1. **I**N recordare, the plaintiff was *non-suited*, and return awarded to the defendant, and had writ to the sheriff accordingly, who returned *averia sunt elongata*; the defendant prayed writ against the pledges, and the Court did not know the name of the pledges, because the deliverance was in pais by plaint, and therefore did not grant it; but if it had been by writ, otherwise it should be; by which the defendant said, That the plaintiff had assets, and prayed *sicut alias* against him, and had it. Br. Retorne de Avers, pl. 27. cites 39 E. 3. 36.

2. If return be awarded in replevin, and the sheriff returns *averia elongata sunt*, the defendant shall have *sci. fa.* against the pledges; quod nota. Br. Retorne de Avers, pl. 15. cites 5 H. 5. 5.

Br. Scire facias, pl. 82. cites 5 H. 5. 7. S. C.

3. A replevin by plaint was sued in the sheriff's court in London, and pledges there found *de retorno habend.* si, &c. this plaint was removed according to their custom into the mayor's court, and after into the King's Bench by certiorari, and there oyer of the certiorari being demanded, the party declared in B. R. and upon this a return awarded, and upon an *elongat.* returned a *scire facias* went against the pledges in the sheriff's court of London. Upon a demurrer, the question was, Whether this case being removed by a certiorari, the pledges in the inferior court are discharged, or whether they remain liable to be charged by this *scire facias*. The Court were inclined to be of opinion, That the pledges are not discharged, for the mischief which might ensue; for then the plaintiff might bring a certiorari, and the defendant would lose his pledges; and on the other side they doubted whether the principal

Comb. 1, 2. S. C. adjournatur, but afterwards adjudged. And per Aston, the party is clearly in court, and consequently the pledges.—3 Mod. 56. S. C. adjudged accordingly.—a Show. 431, pl. 388. S. C. Hill.

36 & 37
Car. 2. ad-
journatur.—
—Ibid.
485. pl. 448.
Mich. 2
Jac. 2. adjudged accordingly.

be in court, but at his pleasure, and that he is not demandable, and cannot be nonsuited, and therefore advis. vult. After it was adjudged that the pledges are not discharged. Skin. 244. 246. Mich. 1 Jac. 2. B. R. Dorrington and Edwin.

(X) Finding Pledges in Replevin. In Case of Rent.

1. 11 Geo. 2. c. 19. S. 23. **E**NACTS, That all sheriffs and other officers, having authority to grant replevins, shall in every replevin of a distress for rent take in their own names from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained, such value to be ascertained by the oath of one or more credible witnesses, or witnesses, not interested in the goods or distress, (which oath the person granting such replevin is hereby authorised and required to administer) and conditioned to prosecute the suit with effect, and without delay, and for duly returning the goods and chattles distrained, in case a return shall be awarded before any deliverance be made of the distress, and such sheriff or other officer taking such bond, shall at the request and costs of the avowant or person aforesaid, making consuance, assign such bond to the avowant, or person aforesaid, by indorsing the same, and attesting it under his hand and seal in the presence of 2 or more credible witnesses, which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon; and if the bond so taken and assigned be forfeited, the avowant or person making consuance, may bring an action, and recover thereupon in his own name; and the court where such action shall be brought may by a rule of the same court give such relief to the parties upon such bond as may agree to justice and reason, and such rule shall have the nature and effect of a defeasance to such bond.

(Y) Demeanor of Sheriff; punishable in what Cases relating to Replevin.

1. **I**F the sheriff upon a 2d deliverance shall deliver the beasts to the plaintiff, and shall not return the writ, so that the defendant cannot have return, he shall have his remedy against the sheriff; quære what remedy, and see Fitzh. Ret. de Avers 20. anno 20 E. 3. that sicut alias was sued in this case. Br. Second Deliverance, pl. 12. cites 32 E. 3. Fitzh. Return de Avers, pl. 19. 34, 35.

2. Where the sheriff takes insufficient pledges de retorno habendo, and return is awarded, and upon this the sheriff returns *averia elongata*, by which *scire facias* issues against the pledges, and the sheriff returns *nihil*; and therefore the defendant had *scire facias*

Br. Pledges,
pl. 1. cite
S. C.—
Br. Parlia-
ment, pl. 3.
cites S. C.

facias against the sheriff, quod reddat ei tot averia & tot catalla, and not action of detinue; quod nota; and yet the statute says where he takes no pledges; and so see that insufficient pledges are as no pledges; and note, that in this case the party may relinquish the advantage of withernam, and betake him to the pledges, or to the sheriff. Br. Retorne de Avers, pl. 2. cites 2 H. 6. 15.

Br. Scire facias, pl. 2. cites S. C.— S. P. Br. Scire facias, pl. 5. cites 9 H. 6. 42.

3. The sheriff is bound to know at his peril whether they are the beasts of the plaintiff or not; for otherwise he has not warranty thereof, and then he is a trespassor. Br. Replevin, pl. 58. cites 21 E. 4. 54.

And shall render damages. Br. Notice, pl. 23. cites 14 H. 4. 24.

4. The replevin is in lieu of pledges, which the sheriff is bound to find, and take by the statute of W. 2. And if he failed to find pledges according to that statute, he would be liable to the avowant's damages, to be recovered by action against him; and where such pledges would not be liable, the obligor that is in lieu of them would not be liable. Et jud' pro def' per Cur. 12 Mod. 380. Pasch. 12 W. 3. B. R. Duke of Ormond v. Brierly.

5. Upon the defendant's having taken a distress, the plaintiff gave security to the sheriff de retorno habendo, and then levied a plaint in the sheriff's court; the defendants demurred to it, and the plaintiff had a rule given him to join in demurrer; but upon his doing it, judgment went against him by default. The goods were removed away, so that the sheriff could not make a return; but yet affidavit was made, that he had given up the replevin-bond to the plaintiff's attorney, who was one of the co-obligors. The Court made a rule upon the sheriff, and the attorney to answer the matters of the affidavit. Barnard. Rep. in B. R. 240. Mich. 3 Geo. 2. 1729. Petrose v. Best, cites 2 Inst. 340.

6. It was moved, that an under sheriff might answer the matters of an affidavit, for granting a replevin upon a distress after the five days were expired appointed by the stat. of Ann. 8. 14. for taking insufficient sureties on the replevin, and likewise for suffering the plaintiff's attorney to set as judge in it. But per Cur. neither of those causes are sufficient to grant the motion. To the first they said, a replevin may be granted at any time before sale. To the second, that the taking sureties was only for the under-sheriff's own indemnity. To the third, that he ought not to answer criminally for the plaintiff's attorney acting against his duty. However, the Court made a rule upon the plaintiff's attorney, that he should answer the matters of the affidavit. 2 Barnard. Rep. 415. in B. R. Pasch. 7 Geo. 2. Price v. Ginkins.

[20]

(Z) *Who may grant Replevins, or hold Plea of them.*
And when, where and how.

1. **R**EPLEVIN shall be sued where the beasts are impounded, and not where the taking was made only; for it may be

If a man distrains cattle in one county, and

drives the
cattle into
another

that they were taken in one county, and impounded in another county; quod nota. Br. Replevin, pl. 63. cites 29 E. 3. 31.
county, the party may sue a replevin in which of the counties he will, but not in both the counties. F. N. B. 69. (I) cites 19 H. 6. 34. &c.

* S. P.
Ibid. pl. 3.
cites 2 H.
4. 9.

2. It was held by all the justices in B. R. clearly, that the *sheriff may award a withernam in the county where replevin is before him by plaint* as it ought to be; for it cannot be without *plaint in writing*; for it shall be in vain that he shall make replevin, and none may award the process due; and yet per Catesby, *after the withernam awarded, if nothing be returned, he cannot award capias*. Br. Wythernam, pl. 9. cites 9 E. 4. 48.

3. The *sheriff may take plaint out of the county, and make replevin immediately*; for it would be inconvenient to stay till the county day by the best opinion. Br. Replevin, pl. 46. cites 21 E. 4. 66.

4. Note, per Cur. of replegiare in the county, and averia elongata sunt returned, the sheriff may award withernam, *though the suitors do not award it, and well by the sheriff*. Quod nota. Br. Wythernam, pl. 18. cites 16 H. 7. 2.

5. If a man be taken within the *Cinque ports*, then he shall have a writ de homine replegiando, directed unto the constable of Dover, and unto the warden of the Cinque ports, or his lieutenant, in the nature of an audita querela. F. N. B. 67. (A).

6. And if a man be taken by the officers of the *forest*, then he shall have a writ de homine replegiando unto the keeper of the forest. F. N. B. 67. (A).

7. Stat. 1 & 2 P. & M. cap. 18. enacts, That the *sheriff shall at his first county day, or within two months after he receives the patent, depute and proclaim in the shire town four deputies to make replevins, not dwelling above twelve miles distant from one another, in pain to forfeit for every month he wants such a deputy or deputies* 5l. to be divided between the king and the prosecutor.

* [21]

12 Mod.
120. S. C.
Pasch. 9
W. 3. ac-
cordingly,
and per
Cur. sup-
pose the
hundred
court might
hold plea of
replevin,
which is
hard to ima-
gine, yet it
must be as a
court; and

8. In trespass for taking, &c. the defendant justified that the place where, &c. was a hundred, and time out of mind had a court of all actions, replevins, &c. grantable in or out of court, and that a replevin was granted to him by the steward out of court, virtute cujus, &c. The question was, if good or not; and the reason of the doubt was, because the county court could not hold plea in replevin at common law, but were enabled by the *statute*, which extends not to the hundred court, which is a court derived out of the county court: but per tot. Cur. clearly, supposing they may grant them in court, yet they cannot prescribe to grant them out of court. 2 Salk. 580. pl. 1. Hill. 8 W. 3. B. R. Hallet v. Burt.

asked how a thing can be grafted on a prescription, which had its original by act of parliament, and gave judgment for the plaintiff.——Skin. 674. S. C. adjudged for the plaintiff. Because the defendant having shewn the property in a stranger, the plea amounts to a general issue, and though a hundred court may hold plea in replevin, this ought to be in court, and not out of court.——S. C. 5 Mod. 252. accordingly; and per Cur. it is true, all these courts do hold plea in replevins, but it is illegal; for the party ought to go to the sheriff for the purpose, whose court is in nature of a court baron; therefore this custom was held to be void, as against law and reason. And so the plaintiff had judgment, the plea being naught.——Carth. 380. S. C. says, it was agreed,

agreed, that the hundred court, and other courts of lords of manors may by prescription hold plea in replevin, and so may incidently have power to replevy goods or cattle taken, but that must be by process of the court after a plaint entered, but not by a parol complaint out of court.——
 Ld. Raym. Rep. 219. Pasch. 9 W. 3. S. C. says, that after several arguments at the bar, it was resolved, that since the sheriff could not replevy by plaint at the common law, but by writ only, and that in his county court; the hundred court, which derives its authority from the county court cannot do it by prescription. And the statute of Marlebridge does not extend to the hundred court; therefore this replevin granted out of this court is ill, especially being granted by the steward who is not a judge of the court, and the usage in such case will not alter the law, therefore judgment was entered for the plaintiff.

* *Marlebridge, cap. 21. and Westminster 1. cap. 17.*

9. It was moved to file an *information against* one T. an attorney, for assuming to himself an authority of *granting replevins*, whereby he, *in his own case*, granted a replevin for his own goods. This was urged to be a great misdemeanor; and that to usurp an authority, as to hold a leet, and summons people in, and the like, is punishable by information, &c. But the Court denied the motion at first, because there was another remedy, viz. by a *parco fracto*, this being a pound-breach, but afterwards they ordered him to shew cause, &c. Note, as no under sheriff ought to practice as a common attorney, so no attorney ought to practice as under sheriff in granting replevins, &c. 11 Mod. 32. Mich. 3. Ann. B. R. Trevannian's case.

(A. a) Pleadings.

See (T)

1. **I**F a man is *non-suited in replevin*, and brings *second deliverance*, there the *plea shall be held upon the first record*; and yet, per Stouf. the defendant may make new avowry; for by the nonsuit all is gone. Br. Second Deliverance, pl. 14. cites Fitzh. Recaption 5.

2. In replevin, *ne tient pas of him* is no plea. Br. Trial, pl. 3. cites 33 H. 6. 8. by the best opinion.

3. Note, that the tenant in replevin shall not plead *hors de son fee*; for he may disclaim. Br. Replevin, pl. 40. cites 5 E. 4. 2. But Brook says the contrary hath been used very often; quod nota. Ibid.—*Hors de son fee* is a good plea. Br. Trials, pl. 3. cites 33 H. 6. 8. by the best opinion.——S. P. per Cur. Br. Issues Joines, pl. 26. cites 38 H. 6. 26.——It is at the election of the plaintiff to plead *hors de son fee*, or to disclaim. Per Kingmil and Fisher J. quod nota. Br. Replevin, pl. 30. cites 21 H. 7. 20.

4. In replevin the defendant justified the taking, because the plaintiff held of him by certain services, and for the rent arrear the defendant justified; and the plaintiff said that he did not hold of the defendant, and a good plea; per Cur. For if the justification be found for the defendant, he shall not have return, as in avowry, and the plaintiff cannot have other plea; for he cannot traverse the seisin, for no seisin is alledged; and he cannot disclaim; for no avowry is made. Br. Justification, pl. 7. cites 15 E. 4. 29. Br. Replevin, pl. 51. cites S. C.

5. In replevin, if the defendant says that the place is ancient demesne, he cannot make avowry to have return; and from hence it follows, that the plaintiff cannot pray that the defendant shall [22] gage deliverance. Br. Replevin, pl. 69. cites 1 H. 7. 11.

6. If

6. If a man distrains for damage feasant, and the owner offers sufficient amends, and the distrainer refuses it, the other shall have replevin, and this sufficiency of the amends so offered, is issuable between them; and if it be found for the plaintiff, he shall recover damages. And if the beasts die in pound after such offer, this is at the peril of the owner, if they die in pound overt; but if they are not in pound overt, this is at the peril of the distrainer; but if writ of the king comes to deliver them, and the distrainer resists it, there if they die, it is at the peril of the distrainer, and the owner shall recover his damages in action upon the statute for disobeying the writ. Br. Distress, pl. 72. cites Doct. & Stud. lib. 2.

7. In replevin for taking and detaining a mare and colt, the defendant pleaded not guilty of the taking aforesaid, *infra sex annos ultimo elapsos*. And it was moved that the plea was good, because it is in effect non cepit, and if he did not take, he could not be guilty of the detaining; besides, if this plea should not be good, the statute of limitations can never be a bar in replevins. But resolved, that the plea is ill, because it doth not answer to the detaining; for perhaps the colt was not taken, but folded in the pound; and one may distrain a thing lawfully, and detain it unlawfully, as by putting it into a castle, so that it cannot be replevin. Sid. 81. pl. 8. Trin. 14 Car. B. R. Arundell v. Trevill.

8. Count in a replevin for breaking of his doors and locks, and carrying away of his goods and cattle: the defendant avows for a rent-charge, and says nothing of the breaking of the doors, &c. Cur. he need not answer it there, but in an action of trespass he must. 2 L. P. R. 455, 456. cites Trin. 7 W. 3. B. R.

9. In replevin for taking live cattle, and several stacks of hay, &c. the defendants confess *captionem averiorum & catallorum*, &c. and justify *quoad averia prædicta*; but say nothing as to the chattels, but pray judgment *averiorum & catallorum*. Per Cur. this is ill, because though they make conusance of the whole, yet they do not answer the whole, and so justify as to part only. If the distress be entire, and it is wrong in part, it is wrong in the whole. The Court doubted what judgment to give, whether to abate the avowry, or that the plaintiff should have judgment final; but held it certainly ill to confess the taking of all, and justify only for part, and would consider what judgment to give. 5 Mod. 77. Mich. 7 W. 3. Johnson v. Adams.

10. In trespass for taking his beasts, the defendant justifies under a replevin in the hundred court of the Bishop of S. and shews that the bishop, &c. have upon complaint to the steward used to grant replevins in the court, or out of it, to replevin cattle, and that one had taken the beasts of J. S. and that he levied a plaint in the said court before the steward, and the steward commanded him to replevy the beasts, &c. the plaintiff demurs, and adjudged *pro quer.* For the defendant having shewn the property in a stranger, the plea amounts to the general issue. Skin. 674. Hill. 8 W. 3. B. R. Hallet v. Birt.

11. Where in a replevin a man justifies the taking of cattle in his own right, he must say, *bene advocat captionem averiorum*, &c. which

which is called an avowry; but where he justifies in the right of another person, then he says, *bene cognovit captionem*, &c. which is called a conusance. 2 L. P. R. 454.

12. A declaration in replevin was brought by bill, which is naught upon a demurrer, because no second deliverance can go, if the plaintiff be nonsuited. 2 L. P. R. 455.

13. Pleading of a *seisin* in replevin, without saying of what estate, is naught. 2 Lutw. 1316. in the case of Payne v. Brigham, cites it as resolved. Trin. 8 W. 3. in C. B. in the case of Saunders [23] v. Hufley.

14. In replevin, the defendant pleaded that the plaintiff *cepit & imparcavit* the 3 cows being the cows of J. S. in the place where, &c. The question was, whether the defendant had confessed possession in the plaintiff, which is a sufficient colour in trespass: but per Holt Ch. J. & tot. Cur. The defendant has not confessed here any possession in the plaintiff; for the defendant having pleaded that the plaintiff *cepit et imparcavit* the cows of J. S. who is a stranger, though *imparcare* signifies to inclose only, yet that will not aid it; for whether the pound be private or publick, he who puts them in, has divested himself of the possession and property of the cattle, then since the defendant has alledged the property to be in J. S. before and until the impounding, and at the time of the impounding they became in custody of the law, the defendant has not given any good colour to the plaintiff, because it is not continued. But the defendant ought to have pleaded that the plaintiff *cepit & detinuit* the cows; and then he had given sufficient possession to the plaintiff. *Ld. Raym. Rep. 219. East. 9 W. 3. Hallet v. Birt.*

15. After *elongata* returned, and *withernam* awarded, the defendant may plead *non cepit*, or he may claim property, if it were a common replevin de averiis; for the sheriff can do no otherwise than return an *elongata*, if he cannot make a deliverance; and *withernam* is the meer consequence of the return of the *elongata*. 2 Salk. 581. Mich. 12 W. 3. B. R. Moor v. Watts.

18 Mod.
426. S. C.
& P.

16. 4 & 5 Ann. 16. S. 4. enacts, That it shall be lawful for any defendant or tenant in any action, or for any plaintiff in replevin in any court of record, with leave of the Court, to plead as many matters as he shall think necessary.

(B. a) Pleadings. Place issuable, in what Cases, and how. See (E. 4) pl. 5.

1: **R**EPLEVIN of taking in T. in a place called L. the defendant said that L. is in S. and not in T. and made avowry to have return, and the plaintiff was compelled to maintain his writ, viz. that L. is in T. though they agreed that the taking was in L. and well; for there may be two L's. Br. Maintenance de Brief, pl. 23. cites 42 E. 3. 18. and 41 E. 3. 8.

S. P. Br.
Replegiare,
pl. 7. cites
42 E. 3. 4.

2. Replevin

* But one defendant cannot say that the property is in another, and that he took them in another vill;

for it is double. Ibid. pl. 8. cites 42 E. 3. 18.—† S. P. And the plaintiff was compelled to maintain that P. is in B. and the other e contra. Ibid. pl. 7. cites 41 E. 3. 4.—‡ S. P. And this goes to the action; per Palton; quod nota. Ibid. pl. 5. cites 9 H. 6. 89.—S. P. but contra in trespass; and Brook says, the diversity seems to be inasmuch as in trespass, he may give this matter in evidence upon the general issue, contra upon a general issue in replevin, quod non cepit. Ibid. pl. 5. cites 20 H. 6. 18.—S. P. Ibid. pl. 47. cites 2 H. 6. 14.

2. Replevin against * two, of a taking in P. in the vill of B. the one said that † P. is in T. and not in B. and for return of the beasts he avowed for damage feasant in his several soil, and the other said, that at the time of the taking the property was in another, ‡ and not in the plaintiff; and both are good pleas. Br. Replevin, pl. 1. cites 2 H. 6. 14.

3. And see Lib. Intr. that the first plea shall be concluded, judgment of the count, and the last, judgment of the writ. Ibid.

*[24] † S. P. Contra in trespass of battery; for in the one case franktencement may

come in debate, and not in the other. Br. Replevin, pl. 47. cites 2 H. 6. 14.—Br. Replevin, pl. 3. cites 9 H. 6. 39. Contra, that is no plea to say that he took them in C. and not in D. by which he added absque hoc, that he took them in D. and then well.—S. P. That it is no plea to say that he took them in another place than where the plaintiff counted, unless he shews cause of the taking as to make avowry, &c. and there the cause or matter of the avowry shall not be traversed; but the issue shall be taken upon the place; quod nota, issue tendered which shall not be tried. Ibid. pl. 45. cites 21 E. 4. 64.

4. Replevin of a taking in sale, the defendant shall not say that the place is named Dale, and not sale; for he cannot plead misnomer of the place, as he may do of the place of which the defendant is named in trespass, but he may say in replevin, that the taking was in † another * place, and not in the place in the writ. Br. Misnomer, pl. 86. cites 16 H. 7. 5.

5. Replevin for taking his cattle in quodam loco vocat. the brills in quodam alio loco ibidem vocat' the boggs, the defendant avowed the taking in prædicto loco in quo, &c. for that H. was seised thereof in fee of the locus in quo, &c. The plaintiff demurred, because here were two places alledged, and the defendant had only answered to the locus in quo, &c. which is but one of the two places; and per Curiam, it is a discontinuance. 1 Salk. 94. pl. 5. Mich. 13 W. 3. B. R. Weeks v. Speed.

1 Salk. 3. pl. 8. S. C. accordingly.—2 Ld. Raym. Rep. 1016. S. C. accordingly, and largely debated.

6. Replevin for taking his mare at H. in quodam loco vocato the king's highway; the defendant made cognisance, and justified the taking in a place called the queen's highway, for that it was the freehold of the Lord Lemster, and traversed the taking in the place called the king's highway, unde petit judicium & retorn' equæ; the plaintiff replied, quod cognoscere non debet; for that the taking was in the king's highway, & hoc petit quod inquiretur per patriam. The defendant demurred, and concluded, et ut prius petit judicium, & quod narratio præd' cassetur; and the plaintiff joined in demurrer. The whole Court agreed, that all the matter of conusance in the plea was waived by the absque hoc, and the conusance in a different place from where the declaration lays the taking is in truth matter only proper in abatement; but the conclusion turning it into an avowry makes it a plea in bar, as all avowries are, and final judgment is always given upon them, if they

they go for the avowant. They also agreed, that where matter in abatement is pleaded in bar, and concluded in bar, judgment final ought to be given. And that the conclusion to the demurrer, viz. unde petit judicium (ut prius) was well enough, and according to the conclusion of the plea in bar; and that the subsequent words, viz. (et quod narratio cassetur) being inconsistent, shall be rejected; and so judgment in C. B. was affirmed in B. R. 6 Mod. 102. Hill. 2 Ann. *Crosse v. Bilson*.

7. In replevin, if defendant will take advantage of a *variance in the place where the taking is laid*, from that in which really it was, he must plead it in abatement, and begin either petit judicium de breve, or de narr' quia dicit, the cattle were taken in such a place, absque hoc, that they were taken in the place in the declaration. And where he comes, et pro return habendo, distinctly says, he avows the taking in the place mentioned in the inducement of his traverse, damage feasant, or for rent, &c. to this no answer is to be given, but all is to depend on the plea in abatement, and it is a proper conclusion in replevin to say, unde petit judicium & return' averior', without saying any thing of damages, for they are given by the statute; per Holt Ch. J. 6 Mod. 103. Hill. 2 Ann. B. R. in case of *Crosse and Bilson*.

(C. a) Pleadings. *Property pleaded in the Plaintiff or a Stranger, in what Cases, and claimed at what Time.*

See (F)
(F. 2) (F. 3)
—(A. 2) pl.
10. 16.—
(E. 2) — (B. 2)
pl. 2. 3.

1. **A**FTER avowry made by the defendant in replevin, he cannot claim property. Br. Gage Deliverance, pl. 24. cites 20 E. 4. 11.

2. It is no plea in trespass that property of the goods was to the plaintiff, &c. *Contra in replevin, quod mirum!* for it seems to be no plea in the one nor the other; but it is a good plea for the defendant in replevin to claim property, but to say that it is in the plaintiff, is no plea as I think; for he cannot have replevin without property or special possession. Br. Property, pl. 3. cites 27 H. 8. 25.

[25]
Br. Tref.
pass, pl. 4.
cites 27 H.
8. 21. S.
C.—In re-
plevin it is a
good plea to
say that the

property is to the plaintiff, and to a stranger, and where there be two plaintiffs, that the property is to one of them. Co. Litt. 145. b.

3. In replevin, the defendant *pleads property in himself, and not to the plaintiff*, upon which the plaintiff demurred, supposing this plea amounted to the general issue, as in trespass such plea does. Per Hale, this may be pleaded in abatement, or in bar. The general issue in replevin is *non cepit*, and upon that issue, property cannot be given in evidence; but if defendant pleads property in a stranger, then it is proper to conclude in abatement. But in this case, the defendant should regularly have claimed a property in the country, and then the sheriff could not have delivered them, but the plaintiff must have brought his writ de proprietate probanda;

Wildman
v. North 2
Lev. 92. S.
C. but there
the plea was
that the pro-
perty was in
a stranger,
absque hoc,
that it was
in the plain-
tiff, ad-
judged ac-
cordingly
but

for the de- but yet this plea serves as an avowry, and the defendant shall have
fendant—a a return. Vent. 249. Mich. 25 Car. 2. B. R. Wildman v.
Ld. Raym. Norton.
Rep. 985.

It is said, that in the case of WILDMAN v. NORTH, the plea was property in the defendant, as it is reported in Vent. 249. and not property in a stranger, as Levins reports.

In replevin, &c. for taking two heifers. The defendant *pleaded* that at the time of the taking, &c. the property of them was in one J. B. *absque hoc* that the property of them was in the plaintiff, *et hoc paratus est verificare unde petit judicium si prædict' R. P. actionem suam prædict' inde versus eos habere seu manutenere debeat, et petunt etiam return' averiorum sibi adjudicari, &c.* Upon demurrer, it was adjudged, that this was a good plea in bar, and that the defendant should have return *without any special suggestion* for that purpose. Carth. 398. Pasch. 9 W. 3. B. R. Parker v. Mellor.—12 Mod. 122. S. C. And the Court at first held, that if the defendant pleads property in himself, he may pray a return; but if it be in a stranger, unless he has the custody by bailment, and so makes a special avowry; it is a question, whether he can have a return. But afterwards this term, adjudged the plea was good, though he had made no avowry at all, because he had the first possession; and it was not reasonable the plaintiff should retain, having no property; and so adjudged that he should have a return.—Ld. Raym. Rep. 217. S. C. accordingly.—Ibid. says the S. P. was resolved Pasch. 10 W. 3. B. R. in case of Parrel v. Strimshaw.—But a Ld. Raym. Rep. 985. Marg. cites it as Parnell v. Scimshaw.

So where the defendant in replevin pleaded in bar, *that the property quoad some of the goods taken was in the defendant, and traversed the property's being in the plaintiff, and quoad some other of the goods, he said that the property was in J. S. and traversed its being in the plaintiff, et hoc paratus est verificare, unde petit judicium si prædict' quer. actionem suam habere debeat, &c.* and prays a return, &c. Upon a demurrer, it was objected, that property in a stranger ought to be pleaded in abatement, and not in bar; but *Curia contra*, and that the law is otherwise; for it utterly destroys the plaintiff's action, and whether the defendant or a stranger has the property, it is all one to the plaintiff since he has it not. 1 Salk. 5. pl. 12. Mich. 1 Annæ. Pregrave v. Sanders.—6 Mod. 81. S. C. And Holt Ch. J. said, he remembered to have heard Hale make the difference, that if property be pleaded in defendant, it may be either pleaded in bar or abatement; if in a stranger, only in abatement; but that upon great deliberation, it had been held since, that there was no difference at all, for both might be pleaded in bar, according to 2 Cr. 519. *SACKILD V. SHERTON. And judgment was, plaintiff nil capiat per Billam, and return awarded per Cur.—*Cro. J. 519. pl. 1. Hill. 16 Jac. B. R. SALKILD V. SKELTON, but S. P. does not clearly appear.—But 2 Roll. Rep. 64, 65. SALKILL V. SHELTON, S. C. adjudged; and resolved that the defendant has election to conclude his plea either in bar or abatement.

It was agreed 6 Mod. 103. Hill. 2 Ann. B. R. in case of CROSS v. BILSON, that in replevin the defendant is both actor and defendant. As defendant, he may abate the plaintiff's writ, which it were vain for him to do if he could not have a return; and therefore he *must proceed from his plea in abatement to make consuance*; for his action being a claim of right to distrain, he ought to make title to it against the plaintiff in the replevin, who claims property in the distress. Yet this rule would be explained; if defendant, in replevin, *claims property in himself*, he shall have return without consuance, because his plea destroys the plaintiff's title. So if he says property in a stranger, and makes no consuance, if that matter be admitted by the plaintiff, there shall be a return without consuance; for in that case, by the admittance, the plaintiff's property is destroyed; but in all pleas that do not shew the property out of the plaintiff, there must be a consuance made, and the plea is what only is answerable, and not the consuance; for to traverse that would be a discontinuance.

4. In replevin, where the defendant *pleads property in a stranger*, he must after his plea make his suggestion thus, *et pro return' habend. idem*, the defendant *dicit quod, &c.* and so set forth particularly why he took the goods; for if a verdict pass for him, he cannot without such suggestion entered upon the roll have a return, 2 L. P. R. 454.

(D. a) Pleadings by Que Estate.

1. **I**N replevin, the defendant made consuance as bailiff of J. S. the plaintiff said that J. N. que estate J. S. has in the seigniori released to M. N. que estate this plaintiff has in the tenancy,
to

to hold by less services; Norton said, the plaintiff ought to shew how he has the estate of M. N. But Shard. said, he is tenant of the land, and you have accepted him by your consance, therefore he need not to shew how he has the estate, by which the other passed over. Br. Que Estate, pl. 17. cites 24 E. 3.

2. In replevin, the defendant avowed because J. N. was lord, and was seised by the hands of W. N. then tenant, &c. of such services que estate of the said J. N. in the tenancy the plaintiff has; and the defendant as bailiff to the lord, avowed, &c. and a good avowry per judicium, notwithstanding that he conveyed to the plaintiff by a que estate without shewing how, &c. For this is the title of the plaintiff to the tenancy, and not his own title to the seignior; for this cannot be conveyed by him by que estate in the seignior, without shewing how, by 34 H. 8. quod nota. For the seignior is here in demand, and not the tenancy, quod nota. Br. Que Estate, pl. 2. cites 3 H. 6. 11.

3. In replevin, see que estate of the part of the plaintiff; for the defendant avowed for rent-charge given to his ancestor in tail, and the plaintiff shewed, that after the gift T. ancestor of the defendant, whose heir, &c. was seised of the land, out of which, &c. in fee, and thereof infeoffed N. with warranty in fee que estate he has, and permitted without question; (the reason seems inasmuch as after avowry made, the defendant is become actor,) and the plaintiff thereto pleaded in bar. Br. Que Estate, pl. 20. cites 21 H. 7. 9. 10.

4. In replevin, the defendant avows, the plaintiff replies in bar to the avowry, and says, that King James was seised, and granted to Sir N. B. who granted to J. S. Que estate by diverse mean assignments came to J. D. and he put in his beasts; to which a demurrer, and ruled for the avowant; for the plaintiff ought to shew that he put in his cattle by the licence of J. D. and should therefore derive a title to him. And though it was objected, that here is an estate pleaded in a third person, paramount the title of the avowant, and therefore the mean assignments after not necessary to be shewn; yet the Court was of a contrary opinion, causa qua supra, and gave judgment for the avowant. Skin. 303, 304. Mich. 3 W. & M. B. R. Tucker v. Hodges.

(E. a) Pleadings. *Traverse* Good, or Necessary in what Cases. See (A. a) pl. 15.

1. **I**N replevin, the plaintiff counted of taking such a day, and the defendant avowed in the same place, and at another day, for damage feasant in his severalty, and the plaintiff said that he had common there, and no plea; for it shall be intended now that the taking was the same day that the defendant avowed; and the reason seems to be, because the count is only supposal, and the avowry matter in fact, by which the plaintiff said that he took it the day that he counted, at which day he had common there, and was not suffered,

S. P. Br.
Replevin,
pl. 52. cites
48 E. 3. 10.
[27]

suffered, because the defendant *had not traversed that it was the common of the plaintiff this day*; for it may be the common of the plaintiff at the day of the count, and the severalty of the defendant at the day of the avowry, by which the plaintiff maintained that he took the day that he counted, *prist*, and the other *e contra*, and so see the day traversable. Br. Traverse per, &c. pl. 37. cites 43 E. 3. 11.

2. Replevin shall not be sued by 3 of several beasts, where they have several properties; but it is a good plea that the one has property in one beast; *absque hoc* that the others have any thing; and so of the others; and the writ shall abate. Br. Replevin, pl. 12. cites 3 H. 4. 16.

3. Replevin; defendants said, that upon the plea in the county, it was returned *averia elongata*, by which 4 cows of the defendant were delivered to the plaintiff in *withernam*, and that he gaged deliverance of the *withernam*. Per Ascue Justice, it does not appear before us of record, that such *withernam* was awarded, therefore he shall have deliverance by suggestion in the Chancery. Per Newton Ch. J. when we are made judges of the plea, by the record of the principal, then we are judges of the accessory; by which Markham said, that he took the beasts the 24th of August, as is declared, of which taking he has brought his action, and such a day after the defendant took other beasts of the plaintiff's, and shewed when, and he sued replevin in the county, and it was returned *averia elongata*, of which eloignment the *withernam* was awarded; *absque hoc*, that the *withernam* was awarded of the beasts taken the 24th of August; and note, that after, nothing was entered of all this matter, but only the declaration, and so it is admitted that the sheriff may award *withernam* in the county. Br. Gage Deliverance, pl. 9. cites 21 H. 6. 40.

4. In avowry for 20s. of rent-service, the plaintiff said that he held by 10s. *absque hoc*, that he held by 20s. and as to the 10s. rien arrear, and to the other 10s. not seized unless by coercion, &c. and an ill traverse, &c. For it implies double matter, by which the traverse was ousted, and the rest of the plea stood; quod nota. Br. Avowry, pl. 121. cites 30 H. 6. 5.

Br. Avowry, pl. 92. cites S. C.

5. In replevin, the defendant avowed in 3 acres parcel of 1000 acres, whereof he himself is seized in fee, as of his proper soil, and for damage feasant avowed, the plaintiff said that he is seized of 800 acres in the same vill in fee, other than those the defendant has whereof the place is parcel; *absque hoc*, that the place where, &c. is parcel of the 1000 acres; and the opinion of the court was, that it is not a good traverse to say that not parcel, but shall say if it was the soil of the defendant or not; for it may be parcel of the 800 acres at one time, and *e contra* at the time of the taking; but he ought to answer if it be the several soil of the defendant or not; quod nota bene. Br. Traverse per, &c. pl. 197. cites 5 E. 4. 117.

6. *Trespas de parco fracto*, and taking his beasts; the defendant said, that J. N. sued replevin to the sheriff of the same beasts, and he made warrant to the defendant to make deliverance, who found the park open, and made deliverance, judgment, &c. and the plaintiff

tiff said that the property of them was to W. P. and he took them for damage feasant, *absque hoc* that the property was in J. N. and a good replication without traversing the possession; for notwithstanding that replication lies of beasts in custody, yet it is a good plea *prima facie*, till it be shewn that J. N. had them in possession or custody. Br. Replication, pl. 54. cites 21 E. 4. 66.

7. In replevin, the defendants made *conusance as bailiffs to A. for rent reserved upon a lease for life*, the plaintiff replied, that 2 strangers had a right of entry into the place where, &c. and that the said 2 defendants by their command entered and took the cattle damage feasant *absque hoc*, that they took them as bailiffs to A. and upon demurrer it was objected, that by this means the intent of the party shall be put in issue, which no jury can try, but only in case of recaption; but it was adjudged the traverse was well taken. Le. 50. pl. 64. Pasch. 29 Eliz. C. B. Buller's case.

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8. In replevin the defendant avowed for damage feasant in his freehold; the plaintiff replied, that long before the defendant had any thing he himself was seised, until by A. B. and C. disseised, against whom he brought assise, and recovered; and that the estate of the plaintiff was mean between the assise and the recovery in it. The defendant rejoined, that long before the plaintiff had any thing, one G. was seised, and infeoffed him; *absque hoc*, that the said A. B. and C. or either of them, had any thing in the said lands, at the time of the said recovery. Walmley J. was of opinion, that the bar to the avowry was not good, because the plaintiff did not allege therein, that A. B. and C. were tertenants at the time of the recovery, which ought to be shewed in every recovery, where it is pleaded; and then when the defendant traversed that which was not alleged, his traverse is not good. But Windham contrary; for the assise might be brought against others as well as the tertenants; as against disseisors, and therefore the plaintiff need not shew that A. B. and C. were tertenants at the time of the recovery, and also the traverse here is well enough. Le. 193. pl. 277. Mich. 31 & 32 Eliz. C. B. Rigden v. Palmer.

9. In replevin the defendant said, that he had property in the beasts *absque hoc*, that the property was in the plaintiff, and so prayed judgment of the writ, and it was found for the plaintiff; it was moved in arrest of judgment, that there never was such a traverse as this, that the plaintiff had not property, but only that the property was in the defendant; and 2dly, the conclusion of the plea is not good, for he ought to conclude to the writ and not to the action. Hobart said, that two men may have such property in the same thing, that every of them may have a replevin; and Hutton said, that when the defendant in the replevin claimed property, he ought to conclude to the action; and Hendon Serjeant being only at the bar, and not of counsel in the case said, that the book of entries is, that he shall traverse the property of the plaintiff, as in the principal case. Hutton J. said, that this was never seen by him; but they all agreed that this being after verdict, judgment shall be given for the plaintiff. Winch. 26. Mich. 19. Jac. Anon.

See (C. 2)
Pl. 3.

(F. a) Judgment. How.

1. **I**N replevin by judgment for the defendant *to have return*, the defendant *shall not have scire facias to have the rent or services, for which he made avowry*; for the judgment is only of the return, by which he *may retain* the cattle till he be paid, and *if they die* in pound, he has no remedy but to *distrain de novo*. Br. Judgment, pl. 100. cites 21 E. 3. 22.

2. If the *sheriff* in replevin *returns that the defendant claims property, and the proprietate probanda issues, and is found for the defendant*, the plaintiff shall take nothing by his writ. Br. Replevin, pl. 15. cites H. 4. 27.

For more of Replevin in general, see *Abotory, Distress, Rent, and other Proper Titles*.

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Replication and Rejoinder.

(A) Replication. Plea at large; *where it must set forth a title at large*.

1. **A** *PLEA at large* is where the plaintiff in his replication *meddles not with the defendant's bar*. As to say that a stranger was seised, and enfeoffed him; or, that his father was seised, and died seised, and so he was seised until, &c. not shewing expressly the descent to be after the defendant's title. Heath's Max. 70.

Heath's
Max. 70.
cites S. C.

2. In *trespass of spoiling his grass*, the defendant pleaded, *That his franktenement, &c.* Kirton said, *He took our grass modo & forma; Prius*; and was not suffered to have this general averment *without shewing how it was his grass*, by which the plaintiff shewed title. Br. Replication, pl. 15. cites 38 E. 3. 11.

3. In *trespass* the defendant said, *That he leased to J. N. for life, who aliened in fee to the plaintiff, by which he entered, and a good replication for the plaintiff, that J. N. ne aliena pas, without making title, or shewing how he has interest*; for he has interest by his possession against all except the defendant; and when the defendant has

has shewn title, it suffices for the plaintiff to deny it, quod nota; and so it seems that the plaintiff in trespass need not make title; contra in assise. Br. Replication, pl. 8. cites 40 E. 3. 5.

4. In *trespass* upon the statute of 5 R. 2. ubi ingressus non datur per legem, the defendant said, *That his father was seised in fee, and infeoffed two in fee, and the one died, and the other survived and leased to the defendant at will, and gave colour to the plaintiff, and a good plea, and the plaintiff said for replication, That one A. a stranger was seised, and died seised, and the land descended to W. who was mother of the plaintiff, which W. dyed, and the plaintiff entered, upon whom the defendant entered, and no plea per tot. Cur.* For though in *assise* upon bar at large the plaintiff may make title at large, and not meddle with the bar, yet in action of *trespass, nor in any other action, a man shall not make title or replication at large, but ought to confess and avoid the bar, or traverse it, quod nota. Br. Replication, pl. 7. cites 34 H. 6. 22.

* Heath's Max. 70. cites S.C.—Where the plaintiff is in some sort bound to answer the bar of the defendant, he may notwithstanding plead at large, without answering the bar; which is (in a manner)

altogether in an *assise*, where a general bar with colour, is pleaded; and not in entry in nature of an *assise*, nor other action. Heath's Max 69. cites 34 H. 6. 46.

Where the defendant in *trespass* doth plead his freehold, the plaintiff is to traverse the same, or to convey a title to himself, and allege a disseisin and regrest, and the trespass mean. Heath's Max. 71: cites S. C. and 3 and 4 Mariz. D. 134.

5. The defendant in *trespass* pleaded his freehold; to which the plaintiff replied, *that long time before the defendant any thing had in the franktenement J. S. was seised, and leased to him for years; and so he was possessed until, &c. and holden a good plea.* Heath's Max. 70. cites 41 E. 3.

6. The defendant in *trespass* for taking a ship, pleaded the gift of the plaintiff; and the plaintiff would have replied, *that he took his ship, prist, and ill; and after would have added that to his plea, absque hoc, that the ship was the plaintiff's tempore doni, and ill also; and lastly, would have pleaded, that tempore doni the ship was Alice at Stile's, and was not suffered; wherefore he added to his plea, that (after the gift) Alice gave the same unto him, and so he took his ship, and that held a good plea, and the defendant rejoined, that it was the ship of the plaintiff at the time of the gift.* Heath's Max. 71. cites 42 Ed. 3. 2.

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7. If the replication be against an act of parliament, recovery, or matter of record, the title must be set forth specially, & de puisne temps; so 10 Aff. 23. of a warranty; but against a matter en fait, the plaintiff may well say, that after his father was seised, and died seised, without shewing how. Heath's Max. 71. cites Fitz. Abr. and Bro. Abr. Tit. Replications and Titles.

8. If the title be before the fine or recovery, it may be general. Heath's Max. 72. cites 47 Ed. 3. 13.

9. The defendant in *trespass* pleaded a gift in tail by the king; and the plaintiff replied, *ne dona pas; and good.* Heath's Max. 72. cites 18 Ed. 4. 10.

10. And where the defendant gives to the plaintiff a title, and in his plea destroys the same, the plaintiff may maintain or traverse that matter without other or further title. Heath's Max. 72. cites 9 Ed. 4. 46.

11. And where the defendant in trespass made title by a gift in tail of a stranger, the plaintiff replied, that he was seised until the defendant did the trespass, and traversed the gift in tail; and good, although his title was but of his own possession. Heath's Max. 72. cites 40 Ed. 3. 5. and 3 Ed. 4. 18.

12. The defendant in a replevin avowed, that B. was seised, and let to him for years; to which the plaintiff replied, that *antequam* B. *aliquid habuit*, A. was seised and let to C. whose estate the plaintiff had; and doubted, whether it were not a mere title, as before at large, because he doth no way encounter with the avowry, nor confess and avoid the same, but only with the word *antequam*. Heath's Max. 70. cites 1 & 2 Mariae, D. 171.

(B) Good. Where they must tend to a proper Issue, and what is a Proper Issue.

1. **I**N assise of rent, the defendant pleaded grant of the rent by A. uncle of the plaintiff whose heir he is, &c. with warranty to this defendant for 10 years, and so is the franktenement in the plaintiff; judgment if he shall have assise during the term. And the plaintiff replied, that he never had such uncle; and admitted for a good replication, by which the defendant durst not stand to it, but waived this plea, and pleaded nul tort. Br. Replication, pl. 30. cites 44 Aff 1.

2. In *præcipe quod reddat*, if the tenant pleads that the demandant has entered after the last continuance, and the demandant replies *prist*, that he did not; this does not make issue, unless the tenant rejoins *prist* that he did. Br. Replication, pl. 50. cites 9 H. 6. 58.

—And Brooke says, see more of this Libro Intrac. placitor.

3. In trespass the defendant pleaded his franktenement, and the plaintiff replied, that he was seised, till by the defendant disseised, upon whom he re-entered, and the trespass mesne between the disseisin and the re-entry, the defendant rejoined, that his father was seised, and died seised, and he entered as heir, and this estate continued till the trespass, *absque hoc*, that he disseised the plaintiff; and it is awarded that all this is only a traverse of the disseisin, and yet all was entered *ex gratia Curiae*. Br. Replication, pl. 19. cites 21 H. 6. 13.

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4. In trespass or false imprisonment, if the defendant justifies, inasmuch as the plaintiff had poisoned J. S. it is a good replication. that he did not poison the said J. S. per Cur. Br. Replication, pl. 57. cites 5 H. 7. 4.

For in trespass, if the defendant says that A. was seised, and infeoffed him, and gives colour, it is no good replication, that his fa-

5. In trespass, the defendant said that T. S. was seised in fee, and infeoffed him, and gave colour, the plaintiff said that before this his predecessor was seised in fee of the manor of C. of which this land is parcel demisable by copy, and leased it to the said T. S. by copy for life of the lessor; and after the lessor died, and this plaintiff was made his successor, and entered into the manor, and was seised till the said T. S. infeoffed the defendant. And it was held per Cur. that this is no good replication; for he ought to say that he entered into the manor,

manor, and was seised till T. S. disseised him, and infeoffed the defendant; for though the entry of T. S. implied a disseisin, yet in pleading he ought to allege expressly how he entered, and by what title; quod nota. Br. Replication, pl. 1. cites 27 H. 8. 4.

ther was seised, and died seised and be entered as heir, and was

seised till A. entered and infeoffed the defendant, but shall say that he was disseised by A who infeoffed the defendant; for issue may be joined upon disseisin, but not upon an entry, if he entered, or not, and shall not shew by what title; quod nota. Ibid.

6. *Scire facias* against K. R. administratrix, upon a judgment against her for a debt due by the intestate, the defendant pleaded that the intestate made a will, and B. his son (an infant) executor, that administration was committed to the defendant, *durante minore ætate*. That B. refused at the age of 17, and thereupon administration, &c. was committed to W. and that at the time B. &c. came of age the defendant had fully administered all the estate which came to her: the plaintiff replied, that at the time B. came of age *devastavit diversa bona*; but doth not say, that the defendant *devastavit*; the defendant K. rejoined, that *ipsa non devastavit*; and being found for the defendant, the plaintiff would have avoided it by an exception to his own replication, viz. that no issue was joined, because it is not alleged in the replication that K. the defendant *devastavit*, but that *devastavit* and K. not named but by a parenthesis. But 3 justices conceived it should be construed, that K. *devastavit*; for she was administratrix, and by intendment the other could not commit the waste, and the rejoinder shews who was meant in the replication, viz. Præd. K. dicit, quod *ipsa non devastavit*. But Yelverton and Croke J. contra, that an intendment shall not make a replication good. But by the opinion of the other 3, judgment was given for the defendant. Cro. C. 79. pl. 2. and 93. pl. 18. Mich. 3 Car. C. B. Oxford v. Rivett.

Hett. 33 & 60. S. C. by name of Margery Rivet's case, adjudged accordingly. — Litt. Rep. 52. S. C. but no judgment mentioned.

(C) Where good, without maintaining the Writ.

1. **T**RESPASS of breaking his close the 1st day of May, anno 8, the defendant pleaded feoffment of the plaintiff the 4th day of May anno prædicto, absque hoc, that he was guilty before the 4th day; and the plaintiff said that he ne infeoffa pas. And per Brian, this no good replication without maintaining the writ, but Littleton, Pigot, and Nele J. contra. Br. Replication, pl. 22. cites 15 E. 4. 22.

2. If in debt upon an obligation, the plaintiff makes a replication as certain as the words of the condition, though not so certain as the case seems to require, yet it is good; as where the condition was, that if A. D. an apprentice, should waste any of the plaintiff's goods, and the same be duly proved by A. D.'s confession, or otherwise, then the obligor would make him satisfaction, the defendant pleaded that no proof was made, &c. The plaintiff replied, that A. D. had received, in Flemish coin, of his, to the value of 3000l. and that he had imbezzled and wasted 400l. thereof, and that he confessed it by writing under his hand, and that he gave notice to the obligor,

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obligor, &c. Upon demurrer it was objected, that the replication was ill, because the plaintiff had *not shewed to whom the confession was made*; yet by the greater opinion, it was held good enough, because it *answered the words of the condition*. Hob. 92. pl. 126. Gold v. Death,

Ibid, 103. The reporter adds a note, That the Court said, the replication in this case was well concluded, and as it ought, quod mirum videtur; for that it seemed to him, that the replication, as to this point, was ill, but well enough for the other, and that the books cited by the counsel for the plaintiff [he himself being counsel for the defendant] were full to the point.

—S. C.

Lev. 226.

by name of Hegman v.

Gerard, accordingly. — Sid. 340. S. C. says, the Court held, that the defendant should have judgment; for it might be, though he had the bowl, yet he had paid for it; and that Windham J. doubted whether the replication was ill, because *the matter of the replication is new*, which may be answered by the other side; but if it had been matter expressed in the condition, there it ought to have concluded to the contrary; and that to this the others seemed to assent. — S. C. cited arg. by counsel on both sides. 2 Show. 359, 362. pl. 353. in the case of the Taylors Company in Exeter v. Clarke. — And in this case Shower, who argued for the plaintiff, and for whom judgment was given, laid down the following rules, viz. 1st, Wheresoever the bar is ill in substance, and the matter contained in it (were it well pleaded) is insufficient to preclude the plaintiff from his action, there, though the replication be naught, yet judgment ought to be for the plaintiff; 'tis true, in Dr. BONHAM's case, in 8 Rep. 120. 'tis there resolved, that where by the plaintiff's replication it appears the plaintiff has no cause of action, there he shall not have judgment though the bar be ill; but when the bar is insufficient in matter, or amounts to a confession of the point of action, and the plaintiff replies and shews the truth of the matter to enforce his case; and in judgment of law such replication be immaterial and idle, yet the plaintiff shall have his judgment; for when the count wants substance, no bar can make it good; so where the bar wants substance, it cannot be made good by a faulty replication. So is Dr. Bonham's case, and the same resolution is in MERRIAL TRESHAM's case, 9 Rep. 110. where it is adjudged, that if the bar be insufficient in matter, and the count be good, although the replication be superfluous, provided it contains no matter which impugns or destroys the plaintiff's action, though immaterial, yet the plaintiff shall have his judgment; and so is TURNER's case, 8 Rep. 123. 2^{dly}, Wheresoever the bar contains matter collateral to, or dehors the condition in avoidance of the whole action, or wheresoever any special, single, particular thing is pleaded, though it be specified in the condition, in these 2 cases, we need not make an assignment of any breach of the condition in our replication: for

for any matter pleaded that would avoid the bond, or tends to avoid it ab initio, if such bar be ill the plaintiff ought to have his judgment, be his replication what it will; because all such kind of pleas do, by implication, agree a non-performance of the condition.

* S. P. by Holt Ch. J. 1 Salk. 138 pl. 2. Pasch. 2 W. & M. B. R. in the case of *MARRINGTON v. ALLEN*; which was debt upon a bottomree bond. The defendant cravedoyer; and the condition was, that if such a ship returned within 10 weeks, and gave an account of the profits, then, &c. The defendant pleaded, that the ship was lost, and did not return. The plaintiff replied, the ship was not lost, et hoc petit quod inquiratur per patriam. The defendant demurred, and shewed for cause, that no breach was assigned in the replications. Shower argued for the defendant, that without a breach the plaintiff had no cause of action, and the condition, by cravingoyer, is become part of the record. And he relied upon 1 Saund. 102. But the Court gave judgment in this case for the plaintiff. — Show. Rep. 148. S. C. accordingly.

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4. *Debt on bond* conditioned to pay 20*l.* within a month after the defendant's using the trade of a taylor in Exeter, and to leave the town on 40 days n tice. The defendant *pleads*, that *the bond is void*, being in restraint of trade. The plaintiff *replied*, that *it was delivered modo & forma*, as set forth in the declaration. Exception was taken to the replication, that it did *not set forth any breach of the condition*, and so no cause of action appeared. But the Court were all of opinion for the plaintiff; for that *the matter pleaded in bar is merely idle and collateral, and admits a non-performance* as much as a release. And judgment was given for the plaintiff by the whole Court, absente Wythens. And upon error brought in the Exchequer-Chamber, the Court were of opinion, that the replication was well enough without alleging a breach, because the plea admitted and supposed a non-performance. 2 Show. 345 to 364. pl. 353. Pasch. 36 Car. 2. B. R. The Taylors Company of Exeter v. Clarke.

(D) Where good. *As to Place.*

1. **H**E who would have the *visne* to try his deed in a foreign county ought to allege the place in his bar; for otherwise he shall not put it into his rejoinder. Br. Lieu, pl. 25. cites 21 E. 3. 10.

2. Where it is *alleged*, that *M. had issue K. in full life*, or if *warranty and assets by descent in fee* be pleaded in *formedon*, he need not to shew where and in what place K. is alive, or where the assets lie, before that the other denies it, and then the other in his rejoinder shall shew the place; quod nota. Br. Lieu, pl. 34. cites 24 E. 3. 64.

Br. Replication, pl. 24. cites 24 E. 3. 83.

3. *Trespass by J. against two*, the one said, that the other was *dead the day of the writ*, &c. and the plaintiff said, that he was *alive and not dead*, and prayed pais where the writ is brought. The defendant said, that he died at D. and prayed pais there, and had it. And so see the place put in the rejoinder, and not before. Br. Lieu, pl. 28. cites 19 H. 6. 4.

4. In *replevin* the defendant avowed in D. in a place called M. for damage *feasant* where the plaintiff declared in a place called S. *absque hoc* that he took them in the place called S. prout &c. and shewed that it was 100 acres of land, and demanded judgment of

Replication and Rejoinder.

the writ, and prayed return. The plaintiff said, that the 100 acres are known as well by the name of S. as by the name of M. and that the place called S. and the place called M. are one and the same place, and not diverse, et hoc, &c. and to the plea pleaded by the manner, &c. Br. Replication, pl. 31. cites 1 H. 7. 11.

5. In *trespass* if the defendant says, that the franktenement of N. and he by his command entered, it is good without saying where the command was made; but if the plaintiff traverses the commandment, then the defendant by replication shall shew in what place the command was given, and not before; quod nota. Br. Replication, pl. 34. cites 3 H. 7. 13.

4 Mod. 97.
S. C. but
misprinted.

6. The defendant pleaded, that he was an attorney of C. B. and ought not to be sued elsewhere, absque consensu. The plaintiff replied, that *he did consent and laid not a venue*, and therefore bad. Per Cur. 1 Salk. 4. pl. 9. Mich. 1 Annæ. B. R. Ode v. Norcliffe.

[34] (E) Good. Though not answering Part of the Defendant's Plea, or being too general.

As in debt upon an obligation, where the condition is to perform covenants, and the defendant pleads performance, but pleads ill; and the plaintiff replies, and shews a

1. **W**HERE the declaration is good, but the bar is ill, and the replication is ill, and a demurrer is to the replication, yet the declaration being good, and the replication in the principal case being only to avoid the bar, which being ill, and therefore no bar, needs not to be avoided; and the replication not being to intitle the plaintiff to the action, the replication was held ill, but yet that judgment should be given against the defendant. But where the replication is to intitle himself to the action, and by the plaintiff's own shewing in the replication he has not any cause of action, there judgment shall be against the plaintiff although the bar be ill. Cro. J. 133. pl. 4. Mich. 4 Jac. B. R. in the case of *Gewen v. Roll*.

*breach which appears to be no breach, the defendant demurs, judgment shall be against the plaintiff; for the Court shall not intend any other breach or cause of action than he himself has shewn, which is not any; wherefore judgment shall be against him. Cro. J. 133. pl. 4. Mich. 4 Jac. B. R. in the case of *Gewen v. Roll*.—S. C. cited 2 Show. 362. pl. 353.*

2. In *trespass* for entering his close and spoiling his grass with his cattle, the defendant pleaded, that *tempore quo, &c. the freehold of the place where, &c. was in J. T. and that he as his servant, and by his command, put in the cattle*. The plaintiff replied and confessed the freehold to be in J. T. but that he long before, &c. had leased the close to the plaintiff at will, who thereupon entered, and was possessed till the defendant did the trespass; and traversed, that the defendant put in the cattle by the command of J. T. And upon demurrer the bar was adjudged good, and not avoided by the replication, which is ill; because being by way of title, he does not intitle himself to any good lease at will, for he did not allege in fact any seisin or possession in J. T. out of which the lease at will might be derived; and the defendant having made a good justification,

justification, the same ought to be answered by the plaintiff by a good title, viz. that J. T. was seised and leased to him at will. Yelv.

147. Mich. 6 Jac. B. R. Witham v. Barker.

3. Debt for rent upon a lease for years made by himself. The defendant pleaded, that the plaintiff *nihil habuit in tenementis prædict. tempore dimissionis prædict.* The plaintiff replied, *quod habuit, &c.* and thereupon being at issue, and found for the plaintiff, and judgment for him, it was assigned for error, that this replication was not good; for he ought to have shewn what estate he had *tempore dimissionis*, so as the Court might adjudge, that he had good authority to demise, and the replying generally, *quod habuit, &c.* is not good, nor is any issue, and therefore the judgment erroneous: and all the Court held, that the replication was not good, and that the defendant might well have demurred for that cause; but the defendant having joined issue, and the verdict finding for the plaintiff, it is now an issue, and the verdict has made the replication good; for the Court is now ascertained that the plaintiff had good authority and estate to demise, wherefore the judgment was affirmed. Cro. J. 312. pl. 12. Mich. 10 Jac. B. R. Gyll v. Glas.

bonum titulum without saying what estate he had; and this was held to be ill on demurrer. 3 Lev. 193. Mich. 36 Car. 2. C. B. Aylet v. Williams.

Yelv. 229. S. C. accordingly, and takes notice, that the lease was not by indenture. —Jenk. 340. pl. 97. S. C.—Covenant was brought for rent on a deed indented, the defendant pleads, *nihil habuit in tenementis*. The plaintiff replied, *quod habuit* general demurrer.

4. Debt upon bond to perform an award, the defendant pleaded, that the arbitrator made an award reciting a suit in Chancery between the parties *for such a cause; and awarded, that the suit should cease, and that the plaintiff should stand acquitted of all matters therein contained; and avers, that he did not further prosecute the said suit. The plaintiff replied, that before the submission the defendant exhibited *quandam billam* in Chancery against him, and sets it forth verbatim; and that after the arbitrament he exhibited another bill, shewing it verbatim; and avers, that they were both for one and the same cause, and that the same matter was contained in both; and so he was not acquitted. It was objected, that this replication was ill; because he did not allege, that any *subpœna* was sued, nor that the defendant answered thereto, nor what became of it; and that the replication likewise saying, that he exhibited *quandam billam*, which is another than is intended in the arbitrament, and therefore not good. And it was adjudged accordingly for the defendant. Cro. J. 339. pl. 5. Pasch. 12 Jac. B. R. Freeman v. Sheen.

dam billam should have been billam prædictam. —Brownl. 122. S. C. by the name of Freeman v. Shield. Adjudged.

*[35] Roll. Rep. 7. pl. 9. S. C. accordingly; and that as to the *quandam billam* it was not good, because the plaintiff might have divers bills in Chancery against the defendant. —S. C. 2 Bull. 93. Trin. 11 Jac. accordingly; and there pag. 95. Doderidge J. said, that *quandam* of Freeman

5. Trespass for entering his close and house at G. the defendant justified by virtue of a warrant upon a *capias utlagatum* to him directed, to execute upon J. S. and it being commonly said, that he was at the plaintiff's house, he went in a foot-path through the close to the house, and asked leave of the plaintiff to enter, who gave it him; and not finding J. S. there, he returned the same way. The plaintiff traversed the licence; whereupon issue was joined and being

So where F. and his wife brought an action of battery and wounding of the wife in the county of Salop against B.

who pleaded a justification by warrant of the sheriff of Worcester, et moliter imposuit manus, &c. absque hoc quod est culpabilis in Com. Salop, but answered nothing to the wounding; and verdict was given for the defendant, and judgment; because it was but a discontinuance upon the point of wounding, which is holden after verdict. Hob. 187. pl. 227. Freestone v. Bowyer.

being found for him, it was moved in arrest of judgment, that the plaintiff had not replied to the close, and no issue was upon that; so that all was discontinued. But all the justices held, that judgment shall be given for that point which is found, and that the discontinuance for other was helped by the statute of jeofails. Cro. J. 353. pl. 7. Mich. 12 Jac. B. R. Wats v. King.

6. In trespass the defendant justified, for that the place where was the freehold of J. Marquis of Winton, and by his command, &c. The plaintiff replied, that it was parcel of the manor of A. whereof J. Marquis of W. was seised in fee, and levied a fine thereof to the use of himself and his wife for their lives, the remainder to E. Pawlett for 100 years, if he so long lived; that after the death of the husband and wife the said E. Pawlett entered and leased to the plaintiff for 21 years, who entered, &c. and averred, that E. was living; and it was demurred because the replication did not answer nor confess or avoid the freehold of the marquis alleged in the bar. But all the Court held, that the bar being a bar at large, and the title in the replication being at large, his claiming but a lease for years was a sufficient and good replication without answering to the freehold; and so adjudged for the plaintiff. Cro. Car. 384. pl. 15. Mich. 10 Car. B. R. King v. Coke.

7. Trespass for taking and chasing 40 sheep, by reason of which chasing one of them died. The defendant pleaded, that the place, &c. is his freehold, and that he gently chased them, quæ est eadem transgressio. The plaintiff replied, and justified for common there. The defendant rejoined by inclosure. The plaintiff demurred. It was objected, that the replication was ill, because the plaintiff says nothing as to the chasing, for he ought to have traversed it. But Twisden said, that the plaintiff relies by his replication upon the common, and waives the chasing; and therefore 'tis good enough; and with this agreed the whole Court. And judgment for the plaintiff. Raym. 185. Hill. 22 & 23 Car. 2. B. R. Anon.

[36] 8. Debt was brought on a bond, &c. the defendant pleaded, that it was given for money won at play; the plaintiff replied, that it was not given for money won at play; and upon a demurrer to this replication, it was insisted for the defendant to be ill, because the plaintiff did not set forth that the money, or any part thereof, was not won at play, as the words of the statute of 9 Ann. 14. are; viz. that all securities, where the whole, or any part of the consideration is for money won at play, shall be void. And the Court being of opinion that the replication was too large and uncertain, gave judgment for the defendant. 8 Mod. 57, 58. Mich. 8 Geo. 1722. Coleborne v. Stockdale.

(F) Necessary in what Cases.

1. **I**N all cases where the plea is in the negative, there needs no replication nor rejoinder; but *secus*, if in the affirmative.

Brown's Anal. 10.

2. In *assise*, and in *assise of mortdancestor*, or *juris utrum*, if the defendant pleads a plea to the writ triable by the jury, there he shall conclude over, if found that it be not to the points of the writ; and therefore this makes issue without other replication, unless *et querens, vel petens similiter*. Br. Replication, pl. 58. cites 40 E.

3. 19.

In such writs no plea shall be to the point of the writ, after a plea in bar. 40 E. 3. 19. b. in a note.

3. In *ward*, the defendant pleaded *fine* to him and to the ancestor, and that he survived, the plaintiff said, *quod partes ad finem nihil habuerunt tempore, &c.* but the ancestor died seised. The defendant said that the conusor was seised in fee tempore finis, &c. And so note, that it is not a perfect issue without rejoinder. Br. Replication, pl. 17. cites 7 H. 6. 20.

Heath's Max. 73. cites S. C. — Littleton said it was once adjudged, that if a man

pleads *quod partes finis nihil habuerunt tempore, &c.* but one *J. N. que estate he has, he shall say, et hoc petit quod inquiretur per patriam*, and the other shall say *et ipse similiter*, and shall not make any rejoinder. Br. Replication, pl. 48. cites 12 E. 4. 13. — So of counterplea of voucher, that he who is vouched, nor any, &c. Ibid. — Heath's Max. 73. cites S. C.

4. Where the tenant pleads jointenancy with A. of the gift, and feoffment of G. it is no plea, that he himself was seised till G. entered and infeoffed the tenant, and A. upon whom he re-entered, and was seised till by the tenant alone disseised; for this entry cannot be intended a lawful entry; by which he said that he was seised till by G. disseised, who infeoffed the tenant, and A. upon whom he re-entered, and over, as above, &c. *quod nota*. Br. Replication, pl. 20. cites 22 H. 6.

Br. Pleadings, pl. 27. cites 22 H. 6. 43. S. C.

5. Where the demandant in *præcipe quod reddat*, counterpleads a voucher that the vouchee, nor any of his ancestors, &c. never had any thing, he shall conclude, *et hoc petit quod inquiretur per patriam*, and the tenant *similiter*; for the tenant shall make no other replication nor rejoinder to it, per Newton: and so see, that in some case issue shall be good without replication or rejoinder. Quære; for none answered to it; but Lib. Intrat. agrees with Newton. Br. Replication, pl. 21. cites 22 H. 6.

Br. Fines pl. 57. cites 22 H. 6. 67. S. C. — Heath's Max. 73. cites S. C.

6. Where the defendant pleads *fine*, and the plaintiff avoids it *quod partes finis nihil habuerunt, nec eorum alter habuit tempore levationis finis & de hoc ponit se super patriam*, the other shall only say, *et dictus querens [or defendens] similiter*, without other replication or rejoinder. Br. Replication, pl. 33. cites 3 H. 7. 9.

Br. Fines, pl. 87. cites S. C.

7. Where error is assigned, that record is entered upon the jurata *quod jurata inter A & B. ponitur in respectu hic usque 15 Pasch. &c.* and no entry is made, *quod idem dies datus est partibus prædictis hic, &c.* the other need not to reply or rejoin, that the custom of C. B. is not to give such *idem dies* upon the jurata; for B. R. and every court

Heath's Max. 72. cites S. C.

[37]

court of common law shall take notice of each other's usage; contra of particular usage in cities and countries; note the diversity thereof. Br. Replication, pl. 68, cites 2 R. 3. 9.

(G) In what Cases there shall be *one or more* Replications. And in what Cases one Replication shall go to *several bars*.

Br. Deux
plea, pl. 11,
cites 14 H.
4. 30. S. C.

1. **I**N debt upon an obligation, to pay a less sum at two days, the defendant pleaded two pleas to the two payments, and the defendant made two replications to the two pleas, and was not suffered to have both, but was drove to the one; for if the condition be broken in part, it is broken in all. Br. Replication, pl. 14. cites 14 H. 4.

Br. Quare
Impedit,
pl. 129.
cites S. C.

2. In quare impedit, if two presentments are alleged, the defendant shall answer to both, but the plaintiff shall not reply to the one; for the issue shall be upon the other only, and not upon both. Br. Replication, pl. 42. cites 7 E. 4. 20.

3. In formedon in descender, the tenant to parcel of the tenements pleaded one fine, and to the residue pleaded another fine between the same parties. The defendant [plaintiff] replied *præcludi non; quia dicit quod præd. seperales fines minime proclam. fuerunt, secundum formam stat. H. 7. Anno 4 nec eorum alter*. Exception was taken that the replication was not formal, because he did not divide it into two parts, viz to answer to the matter in each bar, but had confounded them together with one answer. And it was the opinion of the Court, that this had been the better pleading, but the other which trenches to both fines and proclamations, is good enough, inasmuch as the defaults in effect are apparent, &c. D. 181. b. pl. 52, &c. Pasch. 2 Eliz. Fish v. Broket.

Lev. 287.
S. C. but
S. P. does
not plainly
appear. Et
adjournatur.
2 Keb. 622.
pl. 15. S. C.
Judgment
nisi.

4. An *indebitatus assumpsit*, and *insimul computasset*, was brought by one merchant against another for 55l. &c. found due on account, the defendant pleaded the statute of limitations; the plaintiff replied that the money on the several promises, mentioned at the time of the said promises, became due, and payable upon trade between the plaintiff and defendant, as merchants, and wholly concerned merchandize. And upon demurrer it was insisted to be ill; for the account for the 55l. was stated and agreed, and so became a *dead debt*, and consequently out of the statute. And all the Court held it ill. And it was touched by the Court, that admitting the replication had been limited by the statute, yet when the defendant had pleaded the statute to both the promises in the declaration, which was a good plea, *prima facie*, and the plaintiff made one intire replication to the plea, and the replication is not good as to the *indebitatus assumpsit*, though it had been sufficient as to the *insimul computasset*, yet being intire and *ill in part*, is ill in the whole, and ought to be totally adjudged against the plaintiff. And the reporter, who was counsel of the other side, says he thinks it was a fault

fault in the replication. *Quod nota.* 2 Saund. 124. Pasch. 22 Car. 2. *Webber v. Tivill.*

5. Where the plaintiff has any manner of right, he may alledge it to support his action; and where the *defendant pleads but one fact, there can be but one reply.* 8 Mod. 58. Mich. 8 Geo. 1722. Arg. and judgment accordingly. *Coleborn v. Stockdale.*

* (H) Replication. *Aids Faults in the Plea, &c.* See (L) pl. 3: *In what Cases.*

1. **W**HERE a man *pleads licence, and does not shew the place where, &c.* and the plaintiff replies to it, yet this does not make the plea good. Br. Replication, pl. 41. cites 6 E. 4. 2. *So in other cases where it arises upon a material point, unless it be upon a double plea, there issue taken upon the one shall aid the matter.* Ibid.

2. In debt the defendant *pleads the release of the plaintiff, and shews not where the release was made, the plaintiff replies not his deed, and found with the plaintiff.* The plea is made good by the replication, Mich. 18 E. 4. 17. a. pl. 19. Per Choke.

3. If one *pleads a double plea, and the plaintiff replies to it, and issue is taken thereupon, and found for the plaintiff, he shall have judgment; for now the plea is made good; per Brigges.* Mich. 18 E. 4. 17. a. pl. 19.

4. In debt upon an obligation to deliver 20 as good cloths to the plaintiff in London, as are made in W. in the county of G. the defendant *pleaded performance of it specially; and per Brian and Catesby J. the plea is not good; for those of London, where the plea is, cannot try it; the plaintiff said that he delivered no cloth in London, prout, &c.* And per Catesby, now the replication has made the plea good. Br. Replication, pl. 44. cites 22 E. 4. 2.

5. Debt on a bond, the defendant *pleaded the statute of usury, alleging, that it was agreed, that the plaintiff should have so much money for giving a day of payment, &c. the plaintiff replied, and traversed that it was corruptly agreed, and found for the plaintiff; and it was moved in arrest of judgment, that the issue was taken upon corruptly agreed, which word (corruptly) is not in the plea in bar; but the Court adjudged for the plaintiff, because the plea was made good by the replication; but if both the plea and replication had been ill, yet the declaration being good, it suffices for the plaintiff to have judgment.* Mo. 464. pl. 655. Pasch. 39 Eliz. *Rogers v. Jackson.*

6. Debt upon bond, conditioned that after marriage of the plaintiff, and having a son by his feme, that if he conveyed lands to the value of 40l. per ann. in tail to the son to enjoy after the death of the obligor, that then, &c. The defendant *shews the day of the marriage, and the having of a son: and that he made a feoffment to a stranger to the use of himself for life, and after to the use of the son in tail. The plaintiff says, quod non feoffavit, &c.* The defendant demurs, *ist.* It was held, that although the bar, as here, is ill, yet when

when the plaintiff replies thereto, he has by the *replication lost the advantage of exception to the bar*. And here the bar is ill; for this feoffment, as it is pleaded, is no performance of the condition, because the infant was not made party to the conveyance, nor had any deed or assurance to prove his estate; so is he not sure thereof, nor peradventure can have any knowledge of such an estate, nor means to prove the uses limited, which was not the intent of the condition; it was also held here, that the *plaintiff having admitted the bar to be good, he may traverse the feoffment, or the uses at his election*. Cro. Eliz. 825, 826. Pasch. 43 Eliz. in C. B. Stutfield v. Somerset.

[39] (I) *Where it is a Confession of the Truth of the Plea, &c.*

1. **T**RESPASS done anno the 17th, the defendant pleads a *release of all actions Anno the 16th, and to any trespass after, not guilty*; the plaintiff replied, *that the release was by duress, and ill*; for by this he *confesses* that it was made Anno the 16, and so his action false, and so of his own confession it *shall abate*, and therefore he relinquished it, and maintained his bill that the defendant did the trespass after. Br. Trespass, pl. 243. cites 22 Aff. 86.

2. Declaration upon a *bond*, the condition of which was *for the payment of all monies J. S. should receive upon account of the revenue*. Defendant pleads *general performance*. Attorney general for the king replies that *J. S. or some other person or persons by his order, privity or consent received, or had in their custody, from E. P. his majesty's receiver of the excise, or his agents or clerks, in money and bills touching the said revenue, several sums of money amounting to 13,000l. which he had not paid, though often thereto required*. Ruled that *the averment of the receipts was only an introduction to the breach*, and the real assignment was the non payment, but however, that would have been upon a demurrer, it was cured by defendant's *rejoining that he had paid the money, which is an admission that he had received [it]*. MS. Tab. cites 4th December, 1721. Yale v. the King.

(K) *Shewn in the Replication or Rejoinder. What may or must be.*

1. **F**ORMEDON of the gift of R. Rede said, *actio non*; for before the gift A. was *seised, and leased to R. for life, who was seised, and gave, by which A. entered for the alienation, que estate the tenant has*; judgment *fi actio*. Hill said, *a long time after the gift alleged by you, R. was seised, and gave*; Markham said, *this shall not come without shewing how R. came by it after the re-entry*; Hill said, *after the death of A. one T. was seised, and infeoffed R.*
who

who was seised, and gave; Rede said, R. had nothing of the feoffment of T. Prist, and the other two e contra. Br. Replication, pl. 48. cites 3 H. 4. 16.

2. In *præcipe quod reddat*, the tenant intituled himself by devise by custom to devise time out of mind; the demandant replied, that the devisee was within age, and the tenant rejoined, that the custom is that a man may devise within age; et non allocatur, per Cur. For the custom ought to have been entirely pleaded in the bar. Br. Replication, pl. 51. cites 37 H. 6. 5.

3. *Annuity pro consilio impenso et impendendo*, and shewed that he had given him counsel in *negotiis suis agendis*, and did not shew in whose business, and yet good, per Prisot; for if the defendant says, that he did not give him counsel, &c. then the plaintiff may shew in what things and matters he gave counsel, to which the defendant shall answer; but prima facie the count is good generally; quod Catesby concessit; and so see that a thing often shall be aided in replication or rejoinder. Br. Replication, pl. 27. cites 39 H. 6. 33.

4. In debt against the abbot of a loan to the predecessor, which came to the use of the house, the defendant said, that it did not come to the use of the house; the plaintiff replied, that it came to the use of the house at B. &c. and so shewed the place in his replication, and not before, and well. Br. Pleadings, pl. 120. cites 2 E. 4. 14.

5. In trespass, if the plaintiff does not give his place a name in his count, and the defendant pleads in bar without giving the place a name, there the plaintiff in his replication may give name to the land where, &c. For otherwise, if the plaintiff has several acres in the same vill, and the defendant has justified in some, and in some not, he shall lose his justification, and when the plaintiff has given name in his replication, he may say that the trespass was done in his land named, &c. Br. Trespass, pl. 360. cites 21 E. 4. 80.

6. Where declaration is made upon a gift in tail, and the tenant says, that *ne dona pas*, the demandant may shew gift of other land, and that this land was recovered in value, and so dona; for he cannot have [other] writ or declaration, contra, where it is pleaded in bar; for there he may plead all the special matter at first. Br. Replication, pl. 32. cites 3 H. 7. 5.

7. In some cases the count and the writ also are general without certainty; as assises; but there the certainty ought to be shewn by the replication. And in some cases the writ and count and replication also are uncertain, but there the certainty shall appear by the verdict. Pl. C. 84. Hill. 6 & 7 E. 6. in case of Partridge v. Strange.

Br. Departure, pl. 18. cites S. C.

Replication must have a general certainty; because it is to destroy the excuse of the defendant, which

is always received favourably; per Holt Ch. J. 12 Mod. 665. Hill. 13 W. 3. in case of Vaspour v. Edwards.

8. *Trespass for cutting down oaks*; the defendant pleaded that he was seised of a messuage in D. and so prescribed to have reasonable estovers, *ad libitum suum capiend'* in the woods, underwoods, and trees there, &c. the plaintiff replied, that the place where, &c. is within

3 Le. 218. pl. 289. Mich. 30 Eliz. C. B. S. C. and reported in

[40]

the same
words.

*within the forest of W. and that the defendant, and all those whose estate he hath, &c. have used to have reasonable eltovers of woods, &c. by delivery of the forester or his deputy, prout boscus pati potest & non ad exigentiam petentis; and upon demurrer on that replication, the opinion of the whole Court was, that judgment should be given against the plaintiff; for if he should oust the defendant of his prescription by the law of the forest, he should have pleaded the law of the forest, viz. *lex forestæ talis est, &c. or otherwise, he ought to have traversed the defendant's prescription, here being two prescriptions, one pleaded by the defendant by the way of bar, and the other set forth by the plaintiff in his replication without any traverse of that which is alleged in the bar, which cannot be good; but if the plaintiff had shewed in his replication, that *lex forestæ talis est, &c. then the defendant's prescription had been answered without any more; for none can prescribe against a statute. And though exceptions were taken to the bar, the Court gave judgment upon the replication against the plaintiff. 2 Le. 209. pl. 258. Trin. 29 Eliz. C. B. Russel v. Broker.***

Yelv. 157.
S. C. ac-
cordingly.
—Brownl.
215. S. C.
according-
ly, and
seems to be
a translation
of Yelver-
ton.

9. In trespass and battery the defendant pleaded that at the time of, &c. he was seised of the rectory in the place where, &c. in fee, and that there was corn severed from the nine parts, and because the plaintiff would have carried away his corn, he stood there to defend it, so as the harm the plaintiff received was *de son tort demesne, &c.* The plaintiff replied, *de injuria sua propria absque tali causa.* Upon demurrer, the plaintiff had judgment; for the plaintiff need not answer the defendant's title, because he does not claim any thing in the land or corn, but only damages for the battery, which is collateral to the title, and therefore the general replication is good. Cro. J. 224, pl. 5. Trin. 7 Jac. B. R. Taylor v. Markham.

[41]
Cro. J. 225.
pl. 5. S. P.
in S. C.—
Brownl.
215. S. P.
in S. C.—

10. But when the plaintiff makes a title in his declaration to any thing, and the defendant pleads another thing in destruction thereof, or of the plaintiff's cause of action, there he must rely specially, and not say *absque tali causa.* Yelv. 157. in the case of Taylor v. Markham.

As in trespass of taking his servant, the defendant justified, because the father of the infant, who was the servant, held of J. O. in chivalry, and pleaded certainly how, and died, and the land descended to the infant, servant, within age, by which the defendant, by the command of the said J. O. seised him, and the other said, *de son tort demesne without such cause.* And per Cheyne and Hull, because the defendant has alleged special matter, viz. tenure in chivalry, he shall not have general answer, but shall answer to the special matter; by which he did accordingly, and traversed the command, Br. De son tort, &c. pl. 9. cites 14 H. 4. 32.—Ibid. pl. 42. cites S. C.

Roll. Rep.
240. S. C.
and judg-
ment was
given for
the plaintiff
by assent of
Coke,
Crooke,
and Dode-
ridge:
Haughton
saying no-
thing.—

11. In trespass and false imprisonment, the defendant justified the taking of the plaintiff by virtue of a *latitat* at the suit of one R. B. and at his going out of his office he left him in prison to H. the succeeding sheriff. The plaintiff replied, that B. R. commanded the sheriff to discharge him of his action before his imprisonment, and made to the sheriff a release of his suit, notwithstanding which the defendant detained him; and upon demurrer it was objected, that the sheriff is not bound to obey the plaintiff's discharge upon the *latitat*; for though a sheriff upon a plaintiff's command may let a prisoner out of execution, yet he is not bound to do it; but ad-
judged

judged the replication was good; for the sheriff may as well take knowledge of the party to accept a discharge from him, as of an order to arrest the other at his suit, and that though the arrest was in the time of a former sheriff, yet the law looks upon it as all one. And Doderidge said, that if his refusing to discharge him was from his having no conuſance of him, he ought to have pleaded it; but *having demurred upon the replication, he confeſſes that the plaintiff in the firſt action did make the diſcharge.* Cro. J. 379, 380. pl. 7. Mich. 13 Jac. B. R. Withers v. Henley.

g Bull. 96. S. C. and judgment for the plaintiff by agreement of the whole Court.

12. *Debt againſt an heir upon a bond of the father, the defendant pleaded riens per deſcent; the plaintiff replied affets, but did not ſhew any place.* It was found for the plaintiff; but upon error brought, the judgment was reverſed for that reaſon. Cro. J. 502. pl. 13. Mich. 16 Jac. B. R. Bourn v. Carrington.

2 Roll. Rep. 48. S. C. accordingly. — Jenk. 333. pl. 69. S. C. accordingly.

13. *Treſpaſs for breaking his cloſe and houſe and carrying away a fire-heart, wood, ſtones, timber, and a load of poſts; the defendant juſtified the taking, &c. for that the place where was his freehold; the plaintiff replied, that it was his freehold, and averred the greateſt part of his count, but omitted the load of poſts, and traversed the franktenement of the defendant.* Upon demurrer, becauſe the plaintiff in his replication had omitted the load of poſts, this was held an incurable fault; and the defendant had judgment. 2 Lutw. 1399. Trin. 5 W. & M. Huſtler v. Reines.

14. *Where the defendant pleads matter of excuſe, which admits a non-performance, the plaintiff need not aſſign a breach in his replication.* 1 Salk. 138. pl. 2. Paſch. 2 W. & M. B. R. Meredith v. Allen.

Carth. 116. S. C. — Where an ill plea admits, or ſuppoſes a

non-payment or non-performance of the condition, there is no need of breach in the replication; but if the plea did not admit the ſame, there, though the plea was ill, yet if no good breach be in replication, the plaintiff cannot have judgment; Arg. ſaid, that he had ſundry books to evince and back the difference. Show. 214. Paſch. 3 W. & M. in the caſe of Price v. Harſong.

15. *If new matter be aſſigned in the replication, the ſame may be answered by new matter in the rejoinder.* Agreed by counſel of both ſides; but it was ſaid, that if you ſay in your plea, that you ſaved me harmleſs, you ſhall not be admitted afterwards to ſay, that you ſhould not ſave me harmleſs. Arg. Holt's Rep. 202, 203. Mich. 5 Annæ B. R. in the caſe of Hacket v. Tilley.

11 Mod. 39 S. C. but not S. P.

16. *In replevin for taking his goods, the defendant avowed, and juſtified the taking damage feaſant; the plaintiff replied, that the goods were there, &c. by virtue of a demiſe made to him by the avowant himſelf, and that he entered and was poſſeſſed, &c.* The defendant rejoined and traversed the poſſeſſion, but gave no answer to the demiſe ſet forth in the replication to be made by himſelf; for which reaſon the plaintiff demurred, and the defendant joined in demurrer; and it was inſiſted for the plaintiff, that ſince the traverse of the poſſeſſion was immaterial, and nothing ſaid as to the demiſe, the plaintiff ought to have judgment, and accordingly judgment was given for him. 8 Mod. 343. Hill. 11 Geo. 1725. Cotton v. Owen.

[42]

Sec(C)pl.3. (L) Ought, as well as Plea, to have a proper Conclusion, and what is a proper one.

1. **T**RESPASS of taking 100 sheafs of corn, the defendant said, that he found them in his franktenement damage feasant and took them; the plaintiff replied, that the defendant threshed them, and so de son tort; and per Cur. he shall oust the (so) and then the threshing is a good plea, and so he did; for the threshing makes it punishable ab initio. Br. Replication, pl. 46. cites 22 E. 4. 47.

D. 185. a.
pl. 64. S. C.
Marg. cites
Mich. 1

Eliz. Rot.

837. the re-

plication

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insufficient,

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bar. 2dly,

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did not

shew de-

fect of the

trees as well

as of the

land to E. 6.

3dly, because he did not shew that he claimed the premisses as well as the trees,—Bendl. 75

pl. 118. Mich. 1 Eliz. S. C. accordingly.

2. A lease of lands was made for years to M. with an exception of great trees and woods. Afterwards the reversion was granted by King E. 6. to the Duke of N. who made a lease of lands and trees to C. for years, without impeachment of waste. The duke afterwards was attainted of treason, and the queen granted the inheritance of the lands on which the trees were growing, to S. in fee, who made a feoffment thereof to D. and obliged himself by bond to save D. and the premisses harmless against C. touching the aforesaid lease. Afterwards C. felled the trees, during the continuance of the term; and in an action of debt, brought on this bond, the defendant pleaded non damnificatus; the plaintiff replied, but did not shew that C. claimed the trees by virtue of the lease, nor did he conclude with a sic damnificatus; for which reasons, and especially the last, the plea was held ill. D. 183. b. pl. 61. &c. Pasch. 2 Eliz. Dauntsey v. Southwell.

3. Case for inordinate riding the plaintiff's horse, of which he died; the defendant pleaded in bar the statute of limitations; the plaintiff replied, that he filed an original in trespass against the defendant, returnable cras animarum 3 Willi; and that the defendant was guilty within 6 years before the day of this original, et hoc petit quod inquiretur per patriam. The defendant rejoined, that the said original was prosecuted with intent to declare in debt for 7l. absque hoc, that it was prosecuted with intent to declare as in the replication mentioned. But judgment was given for the defendant for this reason only, viz. that the plaintiff had concluded his replication ad patriam, where he ought to have concluded it with hoc paratus est verificare; for per Cur. when the plaintiff is compelled as here to shew another original than that, which by general intendment is the true writ in the case, he cannot toll the defendant of liberty to give an answer to it. And this case differs from the common case of plene administravit, where the plaintiff replies, that the defendant had assets tempore impetrationis brevis originalis ipsius querentis; for in this case it is intended the true original in the case. Lutw. 98. Hill. 10 W. 3. Cowper v. Towers.

4. If matter of fact triable per pais is pleaded in abatement, the plaintiff may conclude his replication in bar; because final judgment

is to be given after a verdict in that case. Per Holt Ch. J. Carth,
#33. Mich. 9 W. 3. B. R. Bonner v. Hill.

* (M) Judgment in what Cases upon the Replication.

1. **W**HERE the bar is ill, and yet the plaintiff's replication contains matter which shews that the plaintiff has no cause of action, the plaintiff shall not have judgment. Jenk. 183. pl. 71. *But in the case where there is a demurrer to the replication, if the replication be only insufficient, and does not contain such matter, and the count is good, although the demurrer upon the replication be good, yet the plaintiff shall have judgment, for the good count is not destroyed by the bad bar. Jenk. 183. pl. 71. — So in the case of an assise, where the plaint is good, and the bar and the replication bad, and seisin and disseisin is found; the plaintiff shall have judgment Jenk. 183. pl. 71.*

2. When the defendant pleads an insufficient bar to the action, and the plaintiff makes an insufficient replication, and the defendant demurs specially upon the replication; the question was, whether judgment shall be given upon the replication, or the bar. The Court was of opinion, that when the action is of such a nature that the writ or count comprehends the title, as in a formedon or the like, there because there, is a sufficient title for the demandant, so as the judges may safely proceed to judgment for the plaintiff, they shall resort to the bar. But otherwise where the title commences only by the replication, as in assise, trespass, and the like. Godb. 138. pl. 165. Trin. 29 Eliz. C. B. Zouch v. Bamport. *And. 165. pl. 220. S.C. by name of Zouch v. Bamfield. — Lc. 75. pl. 102. S. C. — Mo. 250. pl. 399. S.C. but nothing said upon this point. 3 Rep. 88.*

3. In debt upon a bond to save the plaintiff harmless the defendant pleaded an ill plea, and the plaintiff in his replication alleged an ill breach, and there a nil capiat per billam was awarded nisi; but the Court said they would advise. Sti. 356. Mich. 1652. B. R. Young v. Petit.

(N) In Chancery.

1. **T**HE plaintiff put matter in the replication, which was not contained in the bill, and which matter the plaintiff knew of at the exhibiting the bill; the defendant pleaded and demurred to the replication, which this Court allowed of. Chan. Rep. 259. 17 Car. 2. Goodfellow v. Marshall.

2. A release obtained after replication cannot be read at hearing, but it is to be examined by a new bill, and so both causes be heard together. 3 Chan. Rep. 19. 29 Apr. 17 Car. 2. Hayne v. Hayne. *Nell. Chan. Rep. 105. S.C. in totidem verbis.*

3. Bill to supply a defect in a settlement of lands on the plaintiff, the better to enable him to pay his debts; the cause coming on, upon bill and answer the Court would make no order without replication and proofs. Fin. R. 415. Hill. 31 Car. 2. Sir John Tufton v. Hawtry.

4. If the plaintiff reply to an answer, and without rejoining, and giving rules for publication, bring the cause to an hearing, the answer shall be taken wholly true, as if there had been no replication; for the opportunity which the defendant hath to prove his answer, is taken from him. 2 Chan. Cases, 21. Hill. 31 & 32 Car. 2. at the end of the case of Grosvenor v. Cartwright.

[44] 5. Plaintiff filed a *special* replication, defendant *pleads and demurs* thereto; the plea was, that since his answer put in, he had recovered the estate in question on an ejectment on full evidence at a trial at bar, and demurred to the other parts of the replication, and admitted to be good; but whether, after a plea and demurrer to a special replication allowed, plaintiff may put in a general replication, the Court refused to declare any opinion. Plaintiff's counsel conceived they might, because the plea and demurrer were tied up to that replication only, but seemed to admit that it might have been so pleaded as that the matter settled by the *trial at law*, should not have been drawn into issue, or examined unto. Jefferies C. Vern. 351. pl. 346. Mich. 1685. Nosworthy v. Bassett.

6. Where there is a *plea and answer*, and the plaintiff replies, the replication must be to the answer as well as to the plea; and the replication having been made to the plea only, the Court ordered the plaintiff to file a replication to the answer, nunc pro tunc. 2 Vern. 46. pl. 42. Pasch. 1688. Nicol v. Wiseman.

7. The plaintiff set down his cause to be heard on bill and answer, and had a *decree* against the defendant *by default*; and when the defendant came to shew cause against the decree, it was *altered* in his favour; the plaintiff petitioned to rehear the cause, and *at the rehearing prayed leave to reply* to the defendant's answer, and had it, paying costs. Abr. Equ. Cases, 43. Mich. 1699. Lord Donegall v. Warr.

For more of Replication and Rejoinder in general see
Actions, Arbitrement, Detourment, Trespass,
and other proper Titles.

Report.

(A) By Master in Chancery.

1. **ORDERED**, That a report made be *referred back*, but the defendant to pay costs, if he changed not the report considerably; but no time being prefixed in that order for the master to report, by a subsequent order the report was to be made by the 3d of November. The master was attended several times, and a few days before the 3d of November, gave a certificate that he was ready to report; but by reason of its length, and schedules of particulars, he could not finish it within the time; and without further order for further time, finished his report, which was done 4 or 5 days after the 3d of November; the draught of which report the plaintiff perused, and the report was filed: the first report and the second differed 3700l. So that the report was to the advantage of the defendant 3700l. &c. but the plaintiff proceeded to the hearing of the cause; and the second report being made out of time, viz. after the time elapsed for the making thereof, the same was disallowed, and the first report decreed; but if the defendant would bring into Court the money first reported, the second report should be considered; and the plaintiff got costs taxed to 140l. or thereabouts. And now the defendant moved, that he being also but a trustee might be discharged of the costs, which were not settled by the decree, but imposed only as a penalty, in case he caused the plaintiff to travel in the report without just cause, which he had not done, as appeared by the report. The Lord Chancellor disallowed the motion, and ordered the costs, unless the defendant would bring the money first reported into court, and shewed much displeasure against the master for making and filing the report without warrant, expressing as if it had not been gained gratis. 2 Chan. Cases, 179. Mich. 2 Jac. 2. in Canc. *Burton v. . . .*

[45]

2. Part of a decretal order (as it was signed and inrolled) was left out of the entering book in the register's office, which directed an allowance to the defendant; and in respect of the said omission the order, the master made not such allowance, but upon exceptions to the report the allowance was made. 3 Chan. R. 72. Mich. & Hill. 1671. *Tredcoft v. White.*

Fin Rep.
36. S. C. but
not S. P.

A report by a Master in Chancery, is as a judgment of the Court. Per *Ld. C. Parker*. Wms's Rep. 653. Trin. 1720. in case *Brown v. Barkham*.

By a standing order of the court of Chancery, made by the lords commissioners in the 4 W. & M. it was directed, that all reports

Repugnant.

ports should be *filed within 4 days after the making, otherwise no decree or proceedings to be had thereupon*; but the register reporting that it was sufficient if the report were filed before any proceedings had thereupon, though not done within 4 days after making, Lord C. King agreed thereto. And the Court took it to be well enough, though in this case the motion to confirm the report nisi causa, was made the same day that the report was filed. 2 Wms's Rep. 517. Eyles (and trustees of S. S. Company) v. Waid.

5. It is not usual to *confirm* reports of *receivers accounts*, per Master of the Rolls. 2 Wms's Rep. 661. Mich. 1734. in case of Cowper v. Earl Cowper.

For more of Report in general see the several Books of Practice in the Courts of Equity, and other proper Titles.

Repugnant.

(A) In what Cases *Repugnancy shall make Things void, and what shall be said to be repugnant.*

i. **A** DEED of *feoffment* of land to B. with warranty, proviso *the warranty shall be void*, is a void proviso, as habendum in a deed repugnant to the premises, is void; for both being in one instrument where the last clause is repugnant to the first, the last is void; but if the *proviso leaves any benefit* of this warranty to the feoffee; as if it be, that he shall not vouch, inasmuch as it leaves rebutter to him, it is a good proviso. By deed made at another time, such warranty may be destroyed. Jenk. 96. pl. 86.

2. Where contrarieties are in *several parts of deeds or fines*, the first part shall stand; in *wills* the last, if the several clauses are not reconcilable; as where a manor is devised in the first part of a will to A. in fee, and after in the same will this manor is devised to B. in fee, A. and B. in this case are jointenants, but if in the last clause are negative words, that A. shall not have it, then the devise to B. only, is good. Jenk. 96. pl. 86.

3. In *contracts, gifts, verdicts, evidence*, where direct contrarieties are for the same thing at the same time, all is void. Jenk. 96. pl. 86.

4. A.

4. A. made B. and C. executors, provided that C. shall not administer his goods. B. and C. brought debt upon a bond as executors. It was held that the action was well brought; for the proviso is void. D. 3. b. 4. pl. 7. &c. Trin. 19 H. 8. Anon. S. C. cited 2 And. 141.

5. A. gives lands to B. in tail, provided A. shall take the profits of part for 1000 years; the proviso is void; for in common presumption it takes away the benefit and interest of the grantee in that parcel. Per Wray, in delivering the opinion of the Court. Cro. E. 35. Mich. 36 & 37 Eliz. B. R. in case of Mildmay v. Standish.

6. An award, that each of them shall give the other a general release within four days after the award; proviso that if either of them disliked the award within 20 days after it be made, and should pay to the other within the said 20 days 10s. that then the arbitrement shall be void. The proviso is repugnant, and judgment for the plaintiff. Cro. E. 291. Hill. 35 Eliz. B. R. Sharley v. Richardson.

7. A proviso good in the commencement may by consequence become repugnant, as grant of rent by deed for life, provided that it shall not charge his person; the proviso is good, but if the rent be arrear, and the grantee die, his executors shall charge the person of the grantor in debt; for otherwise they shall be remediless; and so it is now repugnant, and by consequence void. 6 Rep. 41. b. Mich. 3 Jac. B. R. in Mildmay's case.

8. Scilicet, if contrary or repugnant to the matter precedent, shall be void. See Sand. 118. Cutler v. Southern. Ibid. 169. Skinner v. Andrews,

———In a declaration of demise in an ejectment. Hard. 3. Jones v. Williams,

9. This diversity was put by Brotherick, when a thing shall be rejected for repugnancy, and when not; when subsequent words make a thing well explained and perfect before, nonsense, there such words shall rather be rejected, than that what was well before should be made nonsense; but where, by the subsequent words, the thing is made good sense, but altered in its nature from what it was before, they shall not be rejected. Arg. 12 Mod. 611. Ingram v. Foot.

10. If a bishop grants a patent to a man to be vicar-general, wherein he reserves a jurisdiction to himself; it seems to be repugnant and void. And Holt Ch. J. said, What can't a vicar-general do; for if he is restrained, he is not a vicar-general. 11 Mod. 46. pl. 13. Pasch. 4 Ann. B. R. Anon. So where a bishop grants his chancellorship, with a reservation to himself of institution and induction. 11 Mod. 46. pl. 13. Anon.

11. An indictment repugnant to itself, is vicious. 2 Hawk. P. C. cap. 25. S. 64. 79. 85.

2. It is repugnant to suppose, that A. was bound by a writing that he forged, or that he was disseised of land whereof he appears to have freehold. 2 Hawk. Pl. C. cap. 24. S. 64.

(B) Pleadings.

1. **T**RESPASS upon the statute of forestalling in the port of Chichester, the defendant said that C. is no vill, hamlet, nor place known out of the vill and hamlet, but is a place which extends into diverse vills, viz. B. C. and D. and the plea was held repugnant and double; for by the premisses he said that no such place, &c. and by the subsequent he said, that * it is a place which extends into diverse vills. Br. Negativa, &c. pl. 15. cites 7 H. 6. 22. 35.

2. In account against a receiver, it is no plea that he received it to deliver to W. N. which he has done, absque hoc, that he was his receiver to render account; for it is repugnant, by Choke and Moyle; but absque hoc, that he was his receiver in other manor, is a good traverse; quod fuit concessum. Br. Traverse, &c. pl. 125. cites 9 E. 4. 15.

3. Trespass for breaking his house, and walls of the same, the defendant to the breaking of the house pleaded not guilty, and as to the walls he justified. And by the opinion of the Court he shall not have both these pleas, for one is repugnant to the other; for by the justification he confesses himself guilty, though it be excusable, and the house and the walls are all one, and he cannot plead not guilty, and justify, to one and the same thing. Br. Barre, pl. 51. cites 21 H. 7. 21.

4. In trespass, the defendant justified, and prescribed for common belonging to two acres in B. the plaintiff replied, that A. was seised of 200 acres, of which the said two acres were parcel, and traversed that the defendant had common to the said two acres, parcel of the said 200 acres. The verdict was, that the defendant had not common to the said two acres, &c. and judgment accordingly. It was assigned for error, that this traverse is contrary to itself; for the pleading before was, that he had common to the two acres, as parcel of the 200 acres; and in the traverse he seems to contradict this, so that issue is not well joined: but it was ruled to be well; for it is a good issue at first, that he had common to the 2 acres as parcel, but not in gross; so that when he goes further, and says as parcel, &c. as it is in the issue, this word (parcel) is superfluous; and judgment was affirmed. Roll. Rep. 28. pl. 6. Pasch. 12 Jac. in the Exchequer-Chamber. Newcombe v. Burworth

So in judgment, if one declares of a lease made such a day, and that postea, scilicet, such a day, which in truth is before the day mentioned in the

5. It was resolved, where a scilicet comes, and the matter had been well, without alleging what comes after, the scilicet there if what comes after it be repugnant to what comes before, it shall be rejected: as here an agreement was between the plaintiff and defendant, that the defendant should send him so much of the best indigo by the first ship that should come within 2 months after his arrival at Jamaica; and in alleging breach, it was laid, that such a ship came from thence within 2 months, scilicet, such a day, which day is after the two months, there, what comes after the scilicet,

scilicet, being unnecessary, and also repugnant, it shall be rejected. 12 Mod. 579. 580. Mich. 13 W. 3. Johnson v. Meers. lease. 12 Mod. 580.

6. The law disfavours contrarieties and repugnancy, and therefore does not put a man to justify that which he endeavours to disprove. As in assise of masterhip of a chapel against J. S. he shall not name himself master; for it is incumbent on the plaintiff to disprove the defendant's interest. Fin. Law, 13. b. cites 10 H. 7. 9.

For more of Repugnant in general, see Conditions, Devises, Grants, Uses, and other proper Titles.

* Rescript.

[48]

* Rescript, receptio, comes of the Latin verb *recipere*, so called, because the wife, upon the default of her husband, is received as a feme sole alone, without her husband.

(A) Who shall be received, in Respect of Estate, where the Estates are conjoined.

[1. THE words are, *admittantur illi ad quos spectat reversion.*]

band, to defend her right, and it is also called *defensio juris*; and in this case the wife may be received by the statute. And yet ancient authors, who wrote before the statute, speak of a kind of rescript at the common law. The civilians call receipt, *admissionem tertii pro suo interesse*, which more properly is resembled to the receipt of him in the reversion or remainder, that is not party to the writ. Co. Litt. 362. b.

[2. If he in reversion, enters upon his lessee for life, pending the writ, and disseises him, yet he shall be received upon default of the lessee, because there was a reversion at the [time of] the writ brought, and this is not a new reversion. 18 E. 3. 47. b.] See infra, pl. 7. S. C.

[3. If lessee for life enters into religion pending the writ, by which he in reversion enters into the land, admitting that the writ shall not abate by the entry into religion; he in reversion shall be received, though he be seised in demesne. 18 E. 3. 48. b.]

[4. If a guardian in chivalry assigns dower to one who was not the feme of the father of the ward, and she enters accordingly, and an action is brought against her, the heir shall be received upon her default; because, though she be a disseisoress against him, the assignment being void, yet as to strangers she is but tenant in dower. 21 E. 3. 6. adjudged.] Br. Rescit, pl. 50. cites S. C. And says, that the tenant by rescript pleaded *ne dona par-*

[5. If *hæren* and feme lessees for life, in an action against them, make

make default after default, and after *he in reversion enters upon them, and leases the land to them and a stranger for their lives, he shall be received, though his reversion is dependant upon a new estate.* 38 E. 3. 11. adjudged.]

* Fol. 436.

Tenant for

[6. If there be *lessee for life, the reversion for life, the reversion in fee, the * lessee for life makes default, he in the reversion in fee shall not be received.* 18 E. 3. 48. admitted.]

life after issue joined, *may make default in spite of the teeth of him in reversion, and so it is reason that he should be received.* Br. Rescript, pl. 69. cites 24 E. 3. 22.

See Supra,
pl. 2. S. C.

[7. If *pending the writ, he in reversion disseises the lessee for life, and leases to another for life, who leases to the first lessee for life.* Upon default of the lessee, he in reversion shall be received; yet there is a reversion for life in the second lessee; for nothing passed by his lease to the first lessee, but he is remitted. But this is a reversion created pending the writ, and so he cannot be received, and therefore the reversion in fee shall be received. Dubitatur.

† [49]

18 E. 3. 47. b. 48.]

So if he in reversion recovers by writ of waste pending the writ. Ibid. — Or if the lessor and lessee in fee off a stranger pending the writ, there he shall be received, and yet he

has no reversion. — So where the tenant alien in fee, pending the writ, and he in reversion enters, yet he shall be received. Ibid. — And if he dies, and his heir is in by descent, yet he shall be received, quod fuit concessum. Ibid.

(A. 2) Where a Stranger, &c. shall be received to defend a Suit, and upon what Terms. Surety, &c.

This act having before given the wife a cui in vita after the decease of

her husband, does by this branch give her a remedy upon the default, as reddition of her husband in his life-time to defend her right, so as she should not be driven to a real action after the decease of her husband, and this rescript to the wife is given by this act, which she could not have at the common law. 2 Inst. 343.

This act extends to courts that be not of record; as if husband and wife be sued in a court baron by writ of right, &c. upon the husband's default, the wife shall be received. 2 Inst. 343. — S. P. admitted. F. N. B. 19. (G)

† It is to be observed, 1st, That the time of the receipt is *when judgment should be given.* 2d, It is to be understood *de principali judicio*, as in an admeasurement of pasture judgment is given that admeasurement shall be made; and if after admeasurement made and returned, the baron makes default,

Default, the wife shall be received before the principal judgment given. 2 Inst. 343.—11 Rep. 39. a. Mich. 12 Jac. C. B. in METCALFE'S CASE, cites 5 E. 2. tit. Rescript, 165.—See (L) :

In an assise the husband and wife plead a record, and fail thereof, the words of an act made at this parliament, cap. 25. be, habeat pro disseisitore absque ulla recognitione, and yet the wife shall be received in that case, upon the default of her husband; for the words be, absque ulla recognitione, that is, of the recognitors of the assise, and not absque ulla receptione, &c. 2 Inst. 344.

¶ And in respect of this word (ready) tenant by rescript ought always to appear, for upon any default made, judgment shall be given. 2 Inst. 344.—Where rescript was prayed without pleading a plea, it was demurred to, by reason of the words parata petenti respondere; so that she ought to plead a plea immediately, &c. and so was the opinion of the court, &c. Kelw. 160. a. pl. 1. Mich. 2 H. 8. Anon.—See (S)

§ This right must be intended that which the wife had in the lands in demand, at the time when the præcipe was brought against her husband and her, and not at the time of the receipt; for if a præcipe be brought against her and her husband, and after the husband and wife levy a fine, and after the husband makes default after default, albeit the wife has no right in the land at this time, yet may she pray to be received for the right which she had at the time of the original purchased, which in judgment, and by preservation of law, as to the demandant, shall be supposed to continue in uno & eodem statu in the tenancy, as tenant in law, without any change or alteration of the estate, notwithstanding any act done by the tenant. 2 Inst. 344.

This also is to be understood, not only of a tenancy in deed, but also of a tenancy in law, for if the husband and wife be vouched. the wife upon the default of her husband shall be received, and yet she can have no cui in vita in that case, according as this act limits. 2 Inst. 344.

The words be jus suum defendere, and therefore she being not to all intents a feme sole cannot confess, nor render the action. but he in the reversion, that is received, may confess, nor [or] render the action. 2 Inst. 344.

[50]

Likewise * if tenant in dower, tenant by the law of the land, or otherwise for term of life, or by † gift, whereas the reversion is reserved, do ‡ make default, or will give up,

It appears by Bracton, who wrote before this statute, that

he in the reversion should be received by the common law. 2 Inst. 344.—Upon the recovery against such particular tenant, he in the reversion was driven to his writ of right, but he in the remainder was without remedy, if he never had scisin. 2 Inst. 345. See the first part of the Institutes, S. 481, 482.

¶ Though it be said here (eodem modo) in the same manner, yet it is not in the same manner to all purposes, for the wife upon the default of her husband shall be received without shewing any cause. But so shall not he in the reversion, and therefore it is not eodem modo in that respect; and the reason of the diversity is, for that the feme is party to the action, and affirmed tenant by the bringing of the præcipe, but he in the reversion is a meer stranger to the action, and therefore ought to shew cause how the reversion is in him. 2 Inst. 345.

But as to age, he in the reversion shall have the same in the same manner as the wife shall have it, the demandant shall count of new against the wife that is received, & eodem modo against them in reversion or remainder. 2 Inst. 345.

* In a writ brought against a feme guardian in chivalry and her husband, the wife shall not be received for the default of her husband; for it is out of the words of the statute, and the husband has power to alien, or lose the chattel. 2 Inst. 345.

† This is to be understood of a tenancy in tail after possibility of issue extinct, and not of an estate in tail general or special; for upon an estate in tail no rescript is given by this act; because it is an inheritance which may continue for ever. 2 Inst. 345.—10 Rep. 44. Trin. 38 Eliz. B. R. in JENNINGS'S CASE, alias WISEMAN v. CROW, resolved, and says, that with this accords 20 E. 3. Rescript, 17. 39 E. 3. 8. b. 33 H. 6. 22. and that the book in 2 E. 2. tit. Rescript is ill reported, and is to be intended of tenancy in tail after possibility.

‡ Faint pleader was not (as has been said) within this act, but is remedied by a late statute, in case of him in reversion. 2 Inst. 346.

But a nient dedire, and a nihil dicit are (as has been said) within the purview of this act, both for him in reversion, and the wife also, for they are in equal mischief. 2 Inst. 346.

If the appearance of the tenant be recorded, and after he departs in despite of the Court, he in the reversion shall be received; for judgment is to be given upon the default. 2 Inst. 346.

The ¶ heirs, and they ¶¶ unto whom the reversion belongs, shall be ¶ See (E).—admitted § to their answer if they come before judgment. ¶ He must have a re-

version, and not only a condition or possibility. 2 Inst. 345.—See (M. 2)

If tenant for life prays in aid of him in reversion, and he refuses to join, and after tenant for life makes default, &c. he in reversion shall not be received, because he refused to join; but if he had joined, and after the tenant make default, he should have been received. 2 Inst. 345.

If

If a *rent* be demanded against tenant for life, he in the reversion or remainder shall be received by the equity of this statute; albeit the words be, *ad quos spectat reversion*, yet he in remainder upon default of tenant for life, shall be received, for he is in the same mischief. 2 Inst. 346.

It is *not necessary* that he that prays to be received *has the immediate reversion*; for if a lease for life be made, the remainder for life, he in the reversion shall be received; so it is where the reversion is granted for life, he in the reversion in fee may be received. 2 Inst. 346. — 10 Rep. 44. a. b. cites 42 E. 3. 12. b. — But if he that has the *mean estate*, and he in the reversion or remainder in fee prayed to be received at one time, he that has the immediate particular estate, in respect of the proximity shall be received, but if he be received, and make default, he in the reversion in fee shall not be received. 2 Inst. 346. — 10 Rep. 44. b. in JENNINGS'S CASE S. P. in a writ, because the words in the statute being general, viz. (*admittantur hæredes vel illi ad quos spectat reversion*) the law, which always respects order of proximity, respects the next estate though small, be it in remainder or reversion for life, before the great and remote estate in fee; and lays, that with this accords the 24 E. 3. 32. a. b. in Pierce de Grimstead's case.

§ That is, when the time comes, when by law he ought to answer, and therefore he shall have his age, or pray in aid, &c. 2 Inst. 346.

• By the equity of the statute he in remainder shall be received; for

*And if upon such default or surrender, judgment happens to be given, then the heirs, or they unto whom the * reversion belong, after the death of such tenants shall have their recovery by a † writ of entry. In which like process shall be observed, as is aforesaid, in case where the husband loses his wife's land by default.*

the common law, which would not suffer him to be received, suffered a tort, and this statute made for relief thereof shall be extended by equity. Arg Pl. C. 53. b. 54. a. in case of Wimbish v. Talbois.

† This is understood of a writ of entry, *ad communem legem*, which is a speedier remedy, than a writ of right, and the demandant shall count upon a demise according to the writ and usual form; and if the tenant traverse the demise, the demandant shall maintain his count by the recovery by default. 2 Inst. 346.

For in these cases the tenant shall shew his

And so in the cases aforesaid, two actions do concur, one between the demandant and tenant, and another between the tenant, shewing his right, and demandant.

rights according to the form of the writ whereupon he recovered, even as the tenant shall do in the writ in vita, upon the former part of this act, and therefore this branch says, *duæ concurrent actiones*, (viz.) the writ of entry upon this action, and the former writ whereupon the recovery was by default. 2 Inst. 346.

[51] Waste against baron and feme, and a third person, and by writ issued to inquire of the waste, and the waste found and returned into C.B. and the parties were demanded. The feme said, that the third has nothing, but that she and her baron

2. 20 Ed. 1. stat. 3. *Where one by writ demands any tenements against tenant by the courtesy, in tail, in dower, for life, or years, and the demandant sues so far that the lands be in manner recovered, whereupon another, not party to the suit, comes in before judgment given, and says, that he has fee and right in those lands, and prays, that in as much as he is come before judgment, ready to defend his tenement, and to make answer unto the demandant, that he may be admitted thereunto by force of the statute of Westminster; by which, as well, such as had no right, as they which had right, oftentimes in the case before mentioned, falsely, and in desceipt of the Court, did pray to be received to make answer, that by their admission they might prolong the demandant from the judgment and seisin of his land, and to cause those demandants to plead of new; and so the demandants are greatly deferred in the case aforesaid to recover their right in the king's court; it is enacted, that when any before judgment, in the aforesaid case, comes in by a collateral title, and desires to be received, before his resceipt he shall find sufficient surety (as the Court will award) to satisfy the demandant of issues of the lands so to be recovered, from the day that he is received to make answer, until*

until the time that final judgment be given upon the petition of the demandant. And if the demandant recover his demand, the defender shall be grievously amerced if he have whereof, and if he have not, he shall be imprisoned at the king's pleasure; and if he can prove his right to be as good as he affirmed, at such time as he was received, he shall go quit.

are tenants; &c. and prays to be received for default of her baron, &c. and said, that no waste was

done, &c. The plaintiff replied, that they are tenants in common; judgment if she shall be received, &c. The feme rejoined, that sole tenant; prist, &c. Plaintiff insisted that she find surety of issues; but it was answered, that she shall not do it, for she is party to the writ, and tenant of the franktenement, and the statute aids her. And Th. held, that she is within the case of the statute, and therefore she shall not find surety; and after, the feme prayed that she might make attorney, and was received, &c. Fitzh. Resceipt, pl. 189. cites H. 34 E. 3.

In præcipe quod reddat, the tenant made default, and one came and said, that his grandfather leased to the tenant for term of life, saving the reversion. Hill said, your grandfather ne lessa pas; Rede said, you ought to traverse the reversion generally. Per Thirn, there is a diversity where I grant the reversion of my tenant, and he preys to be received, and where I lease for term of life, saving the reversion to me, and to my heirs, and I, or my heirs, pray to be received, in the one case he shall traverse the reversion, and in the other, only the lease, &c. and after the issue was taken, that he ne lessa pas, and he found surety of issues, &c. Fitzh. Resceipt, pl. 80. cites P. 3 H. 4. 15.

Tenant for life made default after default, and J. S. prays to be received, and the demandant grants resceipt; the question was, if he shall find surety according to the statute, the resceipt being granted by the demandant; so that though he recovers, yet he is not delayed but by the reversioner; so as some thought this case, by the demandant's granting the resceipt, is out of the statute. But the better opinion was otherwise, because the statute is in general words; besides, when the demandant is long delayed by the prayee, he is as much prejudiced by him, though he after recovers, as if the prayee had nothing, and had prayed to be received, and the demandant had traversed the reversion, in which case he shall find surety by the statute, and so he shall in the other case, &c. Kelw. 110. a. pl. 32. casus incerti temporis.

3. A man prayed to be received, because the tenant held in dower of his assignment, the reversion to him; Mutl. said, the feme has fee; prist. Seton said, she has only in dower; prist; and upon this found surety. Br. Resceipt, pl. 74. cites 24 E. 3. 40.

4. Tenant by resceipt a latere in cessavit shall tender the arrearages, and shall find surety, &c. Theloall's Dig. lib. 13. cap. 11: cites Mich. 11 R. 2. Resceipt 96.

5. 13 R. 2. cap. 17. When tenants for term of life, tenants in dower, or by the law of England, or in tail after possibility of issue extinct, be impleaded, they be often of the covin of the demandants that the tenements demanded against them shall be recovered, and they will not pray in aid, nor vouch to warranty them in the reversion, but plead in chief such a plea, whereby they know well the tenements shall be lost, in disherison of them in the reversion; (2) it is accorded and assented, that if any such tenant be impleaded, and be in the reversion come into the court, and prays to be received to defend his right at the day that the tenant pleads to the action, or before, he shall be received to plead in chief to the action, without taking any delay by voucher, aid, prayer, nonage, or any other delay whatsoever, (3) So that after such resceipt he shall have no manner of delay by protection, essoin of the king's service, common essoin, nor any other delay whatsoever; but that the business shall be hastened in as much as it may be by the law; (4) and that days of grace be given by the discretion of the judges between the demandant and him that is received in such case, without giving the common day in plea of land, if the demandant will not assent, to the intent that the de-

*[52.]
Before the statute of West. 2. cap. 3. which gave rescent to the wife, and to those in the reversion, where the particular tenant is impleaded; and makes default, vel reddere non licuit, there was no remedy in such cases, but by writ of right, but no entry, and that demandant;

was by reason of the credit which the law gave to recoveries; for if they might enter, wherefore is resceit given, but that was in two cases only; but afterwards because it was found

mandants be not too much delayed, because they must plead with two adversaries; (5) And in the right of pleas that be now depending in such case, they in the reversion shall be received in the manner aforesaid, at the next day that the parties have in court; although the same parties have pleaded in chief before this time.

S. 2. Provided always that they in the reversion, which pray to be received, as before is said, shall find surety of the issues of the tenements demanded for the time that the same mandants be delayed, after the said plea determined between the demandants and tenants, if the judgment pass for the demandant against them in reversion aforesaid, as well where the resceit is counterpleaded, as where it is granted.

that many particular tenants being impleaded would plead faintly, the statute of 13 R. 2. gave resceit in such cases. And upon what reason were these acts and statutes made, if in such cases the entry was congeable? but after these two statutes, another practice was devised, for such particular tenants would suffer recoveries secretly, in such sort that those in the reversion could not have notice thereof, so as they could not before judgment pray to be received; so remedy which mischief, the statute of 32 H. 8. was made, by which all recoveries had against tenant by the curtesy, or otherwise for life or lives, by agreement of the parties of any lands whereof such particular tenant is seised shall be void, as tenant by curtesy, &c. should be void against him in the reversion; and yet there was an evasion to creep out of that statute; for such particular tenants would make a feoffment with warranty, and then the feoffee should be impleaded in a writ of entry, and he vouch the tenant for life, who would aver, and such recovery was holden to be out of the statute of 32 H. 8. For the recovery was not against such particular tenants, &c. For the remedy of which mischief, the statute of 14 El. was made, by which it was provided, that such recoveries had where such particular tenants are vouched shall be void, if such recovery be by covin betwixt them. Arg. 2 Le. 62. pl. 89. Pasch. 31 Eliz. in the Exchequer, in Sir William Pelham's case. Ibid 64. in S. C. by Manwood Ch. B. to the same purpose.

If the reversioner prays to be received upon this statute, he shall say that tenant for life pleads faintly, and pray to be received; and this cause generally shall be good, by reason of the generality of the statute; for whether the title of the action be good or ill, yet if the tenants were of covin with the demandant, the reversioner shall be received, and then the especial cause of covin, or faint pleading shall not be shewn, by reason of the generality of the statute. And so where statutes speak of covin generally, it shall be shewn generally; but otherwise it is of covin at common law, Per Molineux J. Pl. C. 50. b. Mich. 4 E. 6. C. B. in case of Wimbish v. Talboys.

By the equity of this statute which gives resceit for false pleading, resceit shall be for false defending; per Hales J. Pl. C. 54. a. in case of Wimbish v. Talboys.

The form of the entries for him who prays to be received upon default of the tenant for life, is thus, viz. *et sic dicit quod T. S. (the tenant for life) tenet predicta tenementa cum pertinentiis ad terminum ulta suae, reversione inde post mortem praed. T. eidem viz. to him who prays to be received; & heredibus suis spectant' &c.* Pl. C. 158. b. Pasch. 3 Mar. Arg. in the case of Throckmorton v. Tracy.

Tenant for life of the grant of A. made default after default, B. prayed to be received, and shewed a deed of grant of the reversion by A. to him before the lease made to the tenant, exception was taken, because the grant appears to be made prior to the lease; but the opinion being that he should be received, the demandant said, that B. nothing had in the reversion the day of the writ purchased. It was awarded upon a demurrer, that B. be received; and find surety; for the issue will be nothing in the reversion generally.

6. If he in reversion is received, he shall find surety; for it may be that he has nothing in the reversion, contra of party to the writ. Br. Resceipt, pl. 42. cites 9 H. 5. 4.

Fitzh. tit. Resceipt, p. 76. cites Mich. 9 H. 5. 10.

*[53] He who is received shall find surety as well when the resceipt is not counter-

7. In dower, the tenant made default after default, and he in reversion prayed to be received; and per Ascue and Portington, in this case, he need not find surety of the damages; for upon resceipt in action, in which damages shall be recovered, the damages shall be taxed against the tenant by resceipt; but per Newton, he shall find surety of the issues be he received gratis, or though the rever-

son

Don be counterpleaded; for so is the statute, de defensione juris; and the prothonotaries said, that their course is, that where he is received gratis, he shall find no surety, and if the resceipt be counterpleaded, he shall find surety. Br. Resceipt, pl. 65. cites 22 H. 6. 52. pleaded, as when it is counterpleaded. Br. Resceipt, pl. 111. cites 10 E. 4. 9.

8. In præcipe quod reddat, the tenant made default after default, and he in reversion came and prayed to be received by reversion descended to him; and because he is within age, prayed his age, and the demandant said, that he has nothing in reversion, and prayed that he may find surety for the issues in the mesne time, and was compelled to find surety by award; for though he be within age, this is no matter; for he who prays shall not be obliged himself, but [shall give] sureties a latere, and so they did; quod nota. Br. Resceipt, pl. 11. cites 33 H. 6. 6. He in remainder within age was received by default of the tenant for life, and per Cur. he shall find surety be the resceipt agreed

or not. Br. Resceipt, pl. 136. cites 16 H. 7. 5.

9. The surety shall be sufficient of franktenement. Br. Resceipt, pl. 136. cites 16 H. 7. 5.

(A. 3) Of whom. Termor, &c. in Default of see (D), others.

1. **T**HE statute of Gloucester, cap. 11. 6 E. 1. When a man The general mischief before this statute was, that the tenant for
** leases his tenement † in the city of London for years, and he † to whom the freehold belongs || causes himself to be impleaded by collusion.*

term of years was subject to the pleasure of him that had the freehold; for if he had suffered a recovery in a real action, though in truth it was by collusion, (such credit the common law gave to recoveries in real actions) the interest of the termor was overthrown, because he could not falsify a recovery of the freehold; for that *by the common law none could falsify a recovery of a freehold, but he that had a freehold.* This act provides a two-fold remedy, 1st, for the city of London, by writ in nature of a commission to the mayor and bailiffs grounded upon this statute, &c. 2^{dly}, generally by receipt before judgment. 2 Inst. 321, 322.

Another mischief was, that after such a recovery had by collusion, and the lessee ousted thereupon, he should have his action of covenant (at the least upon this word, dimisit, &c.) against the lessor; and so the termor lost his possession and *was driven to his action*, which was a cause of multiplication of suits, et boni legislatoris est lites dirimere. 2 Inst. 322.

* At the making of this statute there was neither tenant by statute merchant, nor staple, nor elegit; for these executions against lands were given by acts of parliament made afterwards; and yet having but chattles, they could not falsify (as has been said) no more than tenant for years. And though in our books there be a concessum, that tenant by statute merchant might falsify, yet the reason yielded there does weaken the authority thereof; for there they gave the reason, for that he was not made party, which he could not be in the præcipe, he having but a chattel, and later authorities are against it, and a judgment in parliament also; yet being in equal mischief, thought they be created since our statute, yet are they within the remedy of this act; for *upon the matter they are but * termors.* But otherwise it is holden in case of a † guardian in chivalry, that he is not within this act; for he comes not in by any contract between the parties, as lessee for years, and tenant by statute merchant, staple, or elegit, generally do, but *meerly by act in law.* 2 Inst. 322.

—* It was argued, that tenant by statute merchant or elegit were within the statute of Gloucester, they being termors by record, which is stronger than a matter in fact to maintain their term, and to avoid the circuitry of bringing assise; but the Court gave no opinion. Kelw. 109. a. pl. 29. casus incerti temporis. —† The guardian is not within this statute to have collusion in preservation of his term. Fitzh. Resceipt, pl. 81. cites Pasch. 7 H. 4. 12. by Thirne and Hankforde.

—S. P. For he comes not to the lands by way of lease, but by course of law. Kelw. 128. a. pl. 94. casus incerti temporis.

This termor for years intended by this law must be by deed, by the express words of the body of this act, (so that the termor have recovery by writ of covenant) which must be by deed, as in those

those days, few were made otherwise; and so it was resolved by the court of C. B. And *this act required a deed, lest it may be used for delay; but now by the statute of 21 H. 8. cap. 15. Tenant for years by deed or without deed may falsify; and so by that law may tenant by statute merchant, staple, or elegit do; which act being a beneficial law is construed favourably.* 2 Inst. 322.

† That is in the court of the *hustings*, the greatest and highest court in London. It is called *hustingum* or *hustings*, of a Saxon words, viz. *hus*. i. e. *domus*, & *thing* i. e. *placitum*; so *hustingum* is as * much as to say *domus placitorum*, or *forum contentiosum*, where causes are pleaded. And other cities have the like court, and so called, as York, Lincoln, Winchester, &c. 2 Inst. 322.

Here the city of London is named, but it appears by what Fleta says, lib. 2. cap. 48. that this *act extends to such cities and boroughs privileged; that is, such as have such privilege to hold pleas as London has; but London was named for excellency. And to the end that merchants and others might enjoy the houses which they held for years, for the advancement of trade and traffick, London was particularly named.* 2 Inst. 322, 323.

‡ These words are stronger than if the statute had said, tenant; and yet the vouchee is taken within this and the other branch also. 2 Inst. 323.

¶ But *the termor* that is to be received by the 2d branch, which refers to this, *must not only allege the collusion, but allege matter for the safeguard of his interest.* 2 Inst. 323.

Paint And makes default after default, or comes into court and gives it
pleader is up to make the termor lose his term, and the demandant obtains his
not taken suit, so that the * termor may recover by writ of covenant;
to be within this act. 2 Inst. 323.—* That is, if the demandant have execution, and the termor ousted; so as he
this act. may have his action of covenant. 2 Inst. 323.

♦ And this *In this case the * mayor and bailiffs may enquire by inquest in the*
enquiry *presence of the termor and demandant, whether such plea was moved*
must be *upon good right, or by collusion and fraud to make the termor lose his*
done by *term;*
writ in na-
ture of a

commission grounded upon this act, directed to the mayor and bailiffs, reciting the lease, the bringing of the action by collusion, and this statute, and concluding thus, *ideo vobis mandamus, quod convocatis paribus coram vobis, & inquisita super hoc plenius veritate, eidem A. (that is, the termor) de prædict' messuagio terminum suum quod iustum fuerit, secundum formam statuti prædict' habere faciatis.* And so regularly, when any like authority is generally given by any act to do justice, it ought to be done by force of the king's writ grounded upon the act, and the writ grounded upon this act is called, *breve de inquirendo veritatem super statutum Glouc.* 2 Inst. 323.

* So as the *And if it be found that it was upon good right, judgment shall*
lessor and *be forthwith given; but if it be found by fraud to cause the termor*
his heirs in *to lose his term, the termor shall enjoy his term, and the * execution*
the mean *of the judgment for the demandant shall be suspended until the term*
time having *be expired.*
the rever-
sion, not-

withstanding the judgment, shall have the rent, and shall punish waste, &c. 2 Inst. 323.—Kelw 208. b. pl. 28. *casus incerti temporis*, S. P. argued, but no judgment. And the reason given why the reversioner shall have the rent, is, because it is incident to the reversion, &c. And the reason given why the reversioner shall punish waste, was, because it is in destruction of the reversion; which is in him.

See falsify- *In like manner shall it be of enquiry before the justices, if the*
ing recover- *termor challenge it before the judgment.*
ies (D)—

This is the 1st act that gave receipt in any case, and by force of this act the termor before judgment may pray to be received to defend the right and interest of his term upon the default, or render, or nient dedire of the tenant, but not upon feint pleader; and tenant by statute merchant, staple, and elegit, are taken within this branch, as well as within the former branch of this act. 2 Inst. 323.

And it is not sufficient for the termor to allege collusion, but he must also traverse the point of the demandant's writ, or plead some bar to his title; for this law that gives him to be received, enables him to plead for the safeguard of his interest. 2 Inst. 323, 324.

If the tenant vouch and the vouchee enters into warranty, and after makes default, the termor shall be received; for albeit the 1st branch (whereunto this doth refer) is when he that has the franktenement makes default, yet inasmuch as the vouchee is tenant in law, (this law being benefi-
cial)

what for safeguard of the interest of the termor) he shall be received; 'or it is within the same mischief. 2 Inst. 324.

2. *Conuser upon a statute merchant brought scire facias against the conusee; surmising, that the conusee had cut wood and levied much money by casual profits, and of the rest shewed acquittance, and prayed scire facias against him to rehave his land, and had it; which was returned, and the defendant did not come; by which came W. and said, that the conusee after the execution granted his interest to N. who granted it to the said W. and because he has term in effect, and came before judgment rendered, he prayed to be received, because this suit is by collusion to make him lose his term. Per Hill; because you may have assise and try the collusion there, and also your term is not certain, as a term upon a lease for years; therefore by award he was ousted of the receipt, and that the plaintiff rehave his land, and the defendant in misericordia. And so see that the statute of Gloucester does not aid him. Br. Receipt, pl. 48. cites 21 E. 3. 1.*

[55]

3. *In writ of entry in the post, upon the default of the vouchee, came one N. and said, that he was tenant for years of the lease of him against whom, &c. and that this recovery was by covin to defraud him of his lease, and traversed the disseisin; for per Cur. the covin is not material without traversing the point of the writ. And Pollard said, let him be received; but Fitzherbert contra. For the statute gives the receipt upon the default or reddition of the tenant, and not of the vouchee. This he held for law, and so it has been held before this time; quod nota. Br. Receipt, pl. 67. cites 14 H. 8. 4.*

If the tenant in præcipe quod reddat vouchee, and the vouchee enters, and after makes default, and the termor comes and prays to be received, he shall be re-

ceived, and the demandant shall have judgment, and execution shall cease till the term ends, and the possession of the termor in the same tenancy is the possession of the recoveror; and if the termor be ousted the recoveror shall have assise. Per Fitzherbert J. quod nemo dedixit. Br. Assise, pl. 1. cites 27 H. 8. 7. — Br. Receipt, pl. 1. cites S. C.

4. *In formedon the tenant pleaded, ne dona pas; and came a tenant by elegit, and shewed his interest and record certain; and said, that this suit is by collusion between the demandant and the tenant to oust him of execution; and prayed to be received by the statute of Gloucester. But note, that this does not speak but of reddition and default, and not of feint pleading. See 21 E. 3. 1. That he may have assise, and he has no term certain, therefore shall not be received; and see 7 H. 7. 26. That he shall not be received upon feint pleading. And per Choke, when termor prays to be received, he ought to shew deed; for the statute is given if he have quarrel, which is intended by action of covenant, but the deed shall not be traversed; quod Danby concessit. Br. Receipt, pl. 75. cites 9 E. 4. 30.*

5. *Where execution is sued against the conuser upon a statute merchant, and after the recognizer suffers feint recovery upon voucher by writ of entry in the post, to oust the conusee of his execution, there the conusee cannot be received; for the statute of Gloucester gives, that the termor, viz. lessee for years, shall be received upon default or reddition of the lessor; and the conusee*

upon a statute merchant is taken by the equity, but the *statute does not give remedy for feint pleading*; and this recovery upon such voucher is feint pleading, and therefore out of the case of the statute, and cannot be taken by any equity. *Quære*; for it was not adjudged. Br. Resceit, pl. 127. cites 7 H. 7. 11.

See (R) (B) In what Cases [one] Man shall be received after Resceit [of another.]

[1. **I**F a prior be received upon default of the lessee, and then the prior dies after the last continuance, the successor prior shall be received. 22 E. 3. 18. b. adjudged.]

[56] (C) Who may allow a Resceit.

Br. Resceit, pl. 28. cites S. C. [1. **I**N assise against baron and feme adjourned into bank upon a special point, if baron makes default at the day of adjournment, she may be received in bank. 3 H. 4. 18.]

[2. In assise against tenant for life, if, upon pleading of a foreign plea, the assise is adjourned, he in reversion cannot be received there upon feint pleading of the lessee. 22 E. 3. 12. b.]

(D) What shall be said a Reversion to be received.

[1. **T**HE words *vel illi ad quos spectat reversio*.]

Litt. S. 481. [2. A remainder in fee shall be received by those words of the S. P.—Co. statute as well as a reversion. 24 E. 3. 32. 38 E. 3. 32. adjudged. 18 E. 4. 27. Co. 10. 44. b. 27 E. 3. 87. b.]

—If tenant for life, the remainder for life, the remainder over in fee be, and the tenant is impleaded, and makes default after default, he in remainder in fee may be received notwithstanding the mesne remainder for life. Br. Resceit. pl. 18. cites 41 E. 3. 12. Per Kirton and Finch.

Contra, if there be a mesne remainder in tail; for the next remainder or reversion of estate of inheritance shall be received. Ibid.

[3. A remainder in tail shall be received upon default of the lessee. 38 E. 3. 32. adjudged. 50 E. 3. 3. b.]

* Br. Resceit, pl. 78. cites S. C. [4. A remainder for life shall be received upon default of the lessee. * 24 E. 3. 32. adjudged. 11 H. 4. 42. b.]

Upon default of the tenant in formedon came J. N. and shewed a fine by which estate was made to the tenant for life, the remainder to J. N. who prayed, and to W. N. and to the heirs of W. N. who is dead; so the remainder is to him for life; and he prayed to be received. And the opinion of the Court was, that he shall be received; by which issue was taken, that nothing in remainder. Br. Resceit, pl. 38. cites 11 H. 4. 42.

[5. A reversion for life shall be received upon default of the lessee. 24 E. 3. 32. 11 H. 4. 42. b.]

Reversion in fee may [6. If there be lessee for life, the reversion for life, the reversion in

In fee, he in reversion in fee may be received upon default of the lessee. 27 E. 3. 87. b. admitted.]

in an action of waste. 10 Rep. 44. b. in Jennings's case.

be admitted
in a præ-
cipe, but not

7. In mort d'ancestor the tenant vouched B. who at the summons ad warrantizand' was essoigned, and after *de servitio regis*, and at the day did not bring his warrant, and at the same day the tenant was essoigned *de servitio regis*, and the demandant prayed the assise by default, and could not have it; for none is yet party but the tenant till the vouchee has warranted, and the tenant has not made default, but is essoigned, by which the essoin was adjudged, and adjourned, & idem dies given to the vouchee, and at the day the tenant did not bring his warrant, by which the vouchee came, and said, that the tenant held for term of life of his lease, the reversion to him, and prayed to be received, and was received. Br. Mortd'ancestor, pl. 32. cites 23 Ass. 15.

8. *Præcipe quod reddat* against baron and feme, who made default after default; and J. S. came and said, that he leased to them for life saving the reversion, and prayed to be received; and the demandant said, that pending the writ, and after the default, he who prayed to be received leased again to the tenants, and to W. N. for life, and so the reversion discontinued by which he prayed the receipt, et non allocatur; but he was received by award, inasmuch as it was confessed that reversion was in him; quod nota; and so see that a man may be received by reversion made pending the writ; quære if this lease for life to the baron and feme, and to the third shall not be a remitter to the baron and feme. Br. Resceit, pl. 119. cites 38 E. 3. 10.

[57]
If a man
brings præ-
cipe quod
reddat
against N.
who has no-
thing, and
pending the
writ, J. S.
leases to him
for life, and
after grants
the reversion
to P. there
P. shall be

received by default, and yet neither of them had any thing the day of the writ purchased, but pending the writ, quod nota. Br. Resceit, pl. 43. cites 9 H. 5. 10.—S. P. Br. Resceit, pl. 60. cites 21 H. 6. 13.

So if tenant for life be impleaded, and after he in reversion grants to me the reversion, I shall be received by this where I had nothing in reversion the day of the writ purchased. Per Ascue. Br. Resceit, pl. 57. cites 19 H. 6. 21.

So it was said by Frowicke and Kingsmill, that if my tenant for life be impleaded, and pending the writ, I make a new lease to him and a stranger by deed, and deliver possession to my first tenant, this is a surrender of the first lease, and a good new lease to him, and to the stranger; and if the one makes default after the second lease, I shall be received of all the land; for if the reversion be all in me it suffices for the resceit, and the transmutation of possession pending the writ is not material; for if he surrenders, yet I shall be received. And a fortiori, if I make to him a new lease before the resceit; and also, if one who has nothing, be impleaded of my land, and I make to him a lease pending the suit, I shall be received upon this default; but if the tenant be tenant in fee simple, when the writ is brought, and pending this writ, he makes feoffment, and retakes an estate for term of his life, there the feoffee shall not be received, &c. Keilw. 70. b. pl. 8. Mich. 21 H. 7.

In *formedon*, where a man has reversion pending the writ, by purchase or descent, yet he shall be received as well as if he had the reversion, the day of the writ purchased. Per Newton clearly. Br. Resceit, pl. 60. cites 21 H. 13.

In *præcipe quod reddat*, the tenant made default after default; and A. came and said, that the tenant had nothing the day of the writ purchased, but W. was seised in fee, and leased to the tenant for life pending the writ, the remainder to this A. by which A. prayed to be received, and per Cur. he shall be received; for he purchased pending the writ for term of his life. Br. Resceit, pl. 113. cites 18 E. 4. 27.

But if he be seised in fee, and writ is brought against him, and pending the writ, he makes feoffment in fee, and retakes the estate for term of life, there the feoffee shall not be received; for when he purchases pending the writ, where he had nothing before, there he has made the writ good; but contra where he is seised in fee, and alienates pending the writ: this alienation is not good pending the writ, which diversity was agreed by all the Court, and the demandant counterpleaded, that the day

of the writ purchased, the tenant was seised in fee, and prayed that he be ousted of the resceit: Br. Resceit, pl. 113. cites 18 E. 4. 27.

If a man purchases the remainder pending the writ, he shall be received, but if remainder or reversion be made pending the writ, a man shall not by this be received. Br. Resceit, pl. 126. cites 16 H. 7. 5. — S. P. 2 Inst. 346. But if the lessee makes the writ good, there shall be a receipt; as if a *precipe* be brought against B. that has nothing, and the *tertenant* make a lease for life to B. he shall be received. 2 Inst. 346. — But Brooke says, it seems that where the reversion has not esse the day of the writ purchased, yet he in reversion shall be received; for the counterplea is, that he had nothing in reversion the day of the writ purchased, nor ever after; and so if he had at any time pending the writ, and at the time that he prays, it is sufficient. Br. Resceit, pl. 60.

S. P. Br.
tail &
donee, pl.
27. cites it
as said else-
where. —

9. In cui in vita it was agreed, that if tenant in tail after possibility of issue extinct makes default after default, and he in reversion prays to be received, he shall be received, and yet the tenant had once fee. Br. Resceit, pl. 47. cites 38 E. 3. 32.

So in *scire facias* upon a fine, the tenant in tail after possibility of issue extinct, made default after issue joined, and he in remainder prayed to be received, and * was received; and yet remainder was to two, and the one released to the other pending the writ, and yet he alone was received, but he shewed the deeds of the remainder, and of release. Br. Resceit, pl. 30. cites 7 H. 4. 10. * S. P. Fitzh. tit. Resceit, pl. 84. cites Mich. 11 H. 4. 14.

But per Skrene, he in remainder cannot be received by default of the tenant in tail. Br. Forger de Faits, pl. 6. cites 15 E. 4.

[58]

10. Baron and feme shewed cause to be received, because E. was seised in fee, and leased to the tenant for life, anno 8 H. 5. and granted the rent to the feme in fee by deed, dated an. 6 H. 5. and viz. 2 years before the lease, and prayed to be received, and had day till now by the *essoign*; and notwithstanding that this cause is insufficient, by reason that the grant of the reversion bore date before the lease for life, yet they were received, and found surety pro exitibus, &c. So it seems that the cause is not traversable, but the reversion, and also notwithstanding that it bore date before the lease, yet it may be that it was not delivered till after the lease; and yet per Marten in some case a man may answer to the insufficiency of the cause upon resceit; but per Hill if he will he may generally be received without shewing cause, but per Paston and Hals at the day of the *essoign*; and prayer to be received the *essoignor* of the demandant may challenge the insufficiency of the cause; by which it was awarded that they shall be received, and the issue upon receipt shall be, that the prayee nothing had in reversion the day of the writ purchased, nor ever after; and the others e contra, and need not to say that he had in reversion the day of the writ purchased. Br. Resceit, pl. 43. cites 9 H. 5. 10.

11. In *formedon*, the tenant pleaded *ne dona pas*, upon which came he in reversion, and said that the tenant has only for term of life the reversion to him, and pleaded feintly, and prayed to be received, and was received, and pleaded the same plea, viz. that *ne dona pas*, quod nota, and the reason seems to be inasmuch as it may be, that the tenant would have feintly defended the demandant. Br. Resceit, pl. 2. cites 2 H. 6. 14.

12. In *præcipe quod reddat* against tenant for life of the lease of baron and feme seised in *jure uxoris* rendering rent he made default after default, and came the baron and feme, and prayed to be received, and were received by award, and yet this lease to the tenant for life is a discontinuance which vests the reversion in the baron alone, and if

If it be the lease of the baron alone, then the feme has no reversion; but because the feme after the death of the baron may agree to the lease by receipt of the rent, or the like, and then it shall be said the lease of both; and so the reversion in the feme, and the agreement and disagreement cannot be in the life of the baron, therefore they were received by award; quod nota; and it is there said for law, that tenant by receipt cannot plead in bar upon his receipt, but may plead to the writ, or for the mischief of the warranty; per Fulth. Quod non negatur. Br. Resceit, pl. 130. cites 10 H. 6. 24.

13. *Where I lease land for life, the reversion to N. for life, and N. enters upon the tenant for life, my reversion is out of me; but if the tenant for life dies, there N. is now seised for life only by this remainder, and my reversion is revived, and there if N. be impleaded and makes default after default, I shall be received. Br. Resceit, pl. 57. cites 19 H. 6. 21. Per Fortescue.*

14. *He in remainder for term of life shall be received by the default of the tenant for term of life, and if he makes default after, yet another in remainder may be received, though he did not offer at the day when the first in remainder was received; for he had no time till now, and he came before judgment. Br. Resceit, pl. 63. cites 22 H. 6. 1.*

15. *In writ of entry, 2 executors came and prayed to be received to save their term by default of the tenant by the statute of Gloucester. Afterwards one relinquished the receipt, and would have surrendered, but was not suffered. And Reade Ch. J. held that the default of the one should not be the default of the other; but Kingmill contra. Br. Resceit, pl. 79. cites 21 H. 7. 25. But Brooke says, the law seems to be with Reade.*

16. *Baron and feme being jointenants, the baron alone was impleaded, and made default, by which the feme prayed to be received, and it seems that she is not receivable; because not party to the first writ, but then the question was, if he in reversion should be received, because only one of the tenants for life is impleaded, and made default. And per Anderson and Windham J. he shall be received and plead the jointenancy in abatement of the demandant's writ. Mo. 242. pl. 381. Mich. 29 Eliz. Caine's case.*

17. *If tenant for life be impleaded, and surrenders pending the writ to him in reversion, he shall be received, and yet he has no reversion in him, et sic in similibus. 2 Inst. 346.* [59]

(E) What shall be said a Reversion to be received within the Statute. What Person.

[1. **T**HE words are, *the heir, vel illi, ad quos spectat reversio, admittantur.*] By colour of these words the

heir apparent of tenant in tail, making default, &c. has been admitted, sed non est lex, quia nullus est hæres viventis. 2 Inst. 346.

[2. *If an infant leases for life, and after the lessee is impleaded,* S. P. 2 Inst. 345. And

so it is of a the infant shall be received upon default of the lessee, though he lease by affirms the estate of the lessee, which was voidable before. 24 E. 3. baron and 23. Adjudged. 28 E. 3. 98. Adjudged.] feme.—

So in *assise against baron and feme and an infant*, the *assise* was awarded by their default, which remained by default of jurors; and now the *feme* came, and prayed to be received, which was greatly debated; but after she made default, and the infant was received to plead, by award. *Quare* if this was by reason of his age; for it was after the *assise* awarded, which is a judgment, and he who will be received, ought to come before judgment. Br. Resceit, pl. 126. cites 29 Aff. 96.

S. P. For he [3. If the lessee for life of the king makes default, the king in cannot be reversion shall not be received; because if he shall be received the come tenant, nor be writ shall abate, inasmuch as the suit is not given against him, but in loco tenentis. 25 E. 3. 48. Adjudged per Curiam.] 3
Inst. 346. cites S. C. & 4 E. 3. 38.

Scot v. Tagel S. C. And. 133. pl. 181. Adjudged that B. shall not be received; for 4. S. brought a *formedon* against A. who made default after default; and now came B. and surmised to the Court, that C. was seised of the land in demand, and gave the same to A. in tail, the remainder to the said B. in fee, and prayed to be received; and afterwards the court, upon advice, ousted him of the receipt. 4 Lc. 51. pl. 134. Mich. 31 Eliz. in C. B. Scot's case.
the estate tail is estate of inheritance, and perdurable by the intention of the law, whereas resceit was granted and intended by the statutes for such as had estates depending upon particular estates for life, tenants by the curtesy, after possibility, &c. which determined by death of the tenants, and not for any other, &c.

(F) In what Actions Resceit shall be.

That resceit lies in [1. FEME shall be received upon default of her baron in a præcipe quod reddat. 3 H. 6. 29.]

quod reddat. See Br. Resceit, pl. 3. cites 3 H. 6. 20.—pl. 9. cites 20 H. 6. 20.—pl. 10. cites 20 H. 6. 23.—pl. 11. cites 33 H. 6. 6.—pl. 12. cites 33 H. 6. 19.—pl. 15. cites 35 H. 6. 31.—pl. 16. cites 40 E. 3. 12.—pl. 18. cites 41 E. 3. 12.—pl. 20. cites 44 E. 3. 6.—pl. 24. cites 48 E. 3. 25.—pl. 39. cites 5 H. 5. 10.—pl. 41. cites 9 H. 5. 3.—pl. 43. cites 9 H. 5. 10.—pl. 46. cites 38 E. 3. 22.—pl. 51. cites 21 E. 3. 8.—pl. 52. cites 21 E. 3. 13.—pl. 54. cites 21 E. 3. 45.—*pl. 57. cites 19 H. 6. 21.—pl. 58. cites 19 H. 6. 46.—pl. 68. cites 24 E. 3. 23.—pl. 107. cites 2 E. 4. 16.—pl. 108. cites 2 E. 4. 25.—pl. 113. cites 18 E. 4. 27.—pl. 114. cites 19 E. 4. 4.—pl. 116. cites 22 E. 4. 25.—pl. 118. cites 14 H. 4. 16.—pl. 119. cites 38 E. 3. 10.—pl. 130. cites 10 H. 6. 24.—pl. 133. cites Ilin Derb. 3 E. 3. (bis) ibidem.—Br. Parnour, cites 12 H. 4. 21.

*[60]

S. P. Br. Resceit, pl. 72. cites 24 E. 3. 81. Per Skip. [2. He in reversion shall be received, upon default of the lessee in writ of mesne. 30 E. 3. 7. b.]

Br. Resceit, pl. 4. cites 3 H. 6. 28. Per Rolf. [3. In quid juris clamat, feme shall be received. 3 H. 6. 29.]

Br. Resceit, pl. 6. cite S. C. as Kempton's case, in which she was received; but that Paston held the contrary, unless the baron had claimed fee before. [4 So in a quem redditum reddit. Dubitatur. 9 H. 6. 22.]

Baron and feme made default after default, till writ of inquiry of the waste was awarded, and returned served, and at this day [5. So in writ of waste. 3 H. 6. 29.]

day came the feme, and prayed to be received; fed non adjudicator. Br. Receipt, pl. 4. cites 3 H. 6. 28.—But Br. Receipt, pl. 61. the feme was received in writ of waste, cites 21 H. 6. 46.

In waste against baron and feme, if the baron makes a default, the feme may be received, and so cannot any other man; quod nota. Br. Receipt, pl. 116. cites 22 E. 4. 35.—Co. Litt. 355. a. b. S. P.—Receipt lies in writ of waste. Br. Waste, pl. 29. cites 42 E. 3. 21, 22.

[6. So in assise. 3 H. 6. 28. b.]

Br. Receipt, pl. 41

cites S. C. that the feme shall not be received where the assise is awarded by default.—In assise in pais, the baron made default, and the feme prayed to be received, and the plaintiff prayed the assise; and they were adjourned into bank, and there the feme was received; quod nota. Br. Receipt, pl. 125. cites 19 Aff. 5.

In assise against G. and his wife at Warwick before Dyer and Barham justices of assise, the husband made default. The assise was awarded by default, and the wife came and prayed to be received. The opinion of the said justices was, that receipt lay in that case as in other cases of præcipe quod reddat; and therefore the wife was received. And now Dyer in banco demanded of his companions the other justices, if the receipt was well granted; and by Manwood and Mounson justices clearly, the receipt lies; for although the statute does not give receipt, but where the lands in demand are to be lost by such default of the husband. and in an assise the land shall not be lost by the default of the husband, but the assise shall be taken by default; yet because the husband and wife lose their challenges to the jury, because the assise is taken by default, it seemed to the justices, and also to the prothonotaries, that the receipt did well lie in this case. 2 Leon. 9. pl. 11. 19 Eliz. in C. B. Gregory's case.

[7. So in writ of entry in nature of an assise, the feme shall be received upon default of the baron. 12 R. 2. Ayd. 122.] In entry in nature of assise, he in reversion may be received. Contra in assise; per Newton. Br. Receipt, pl. 124. cites 14 H. 6. 22.

[8. In a quid juris clamat against baron and feme, supposing them tenants for life, if they do not claim fee, yet the feme shall be received upon default of the baron. 3 H. 6. 29. Contra 21 E. 3. 1. b.] Quid juris clamat against baron and feme, who claimed fees upon which they were at issue, and at the venire facias the baron made default, and

[9. [So] in quid juris clamat against baron and feme, supposing them tenants for life, if they claim fee, and then make default, the feme shall be received, because otherwise she shall lose the franktenement by the default of the baron for the claiming of the fee. 21 E. 3. 1. Adjudged.]

came the feme, and prayed to be received, and was received, by award, notwithstanding that no land or tenement be in demand, and pleaded in bar to the moiety, and confessed for the other moiety ready to attorn; and because the Court said that a feme cannot attorn in the absence of her baron, nor is her attornment of effect without the baron; therefore distress ad attornand. was awarded against the baron and feme. Br. Receipt, pl. 49. cites 21 E. 3. 1.

[10. In writ of error brought by lessee for life, upon recovery had against him upon his default, he in reversion shall be received. 21 Aff. pl. 17. adjudged. 21 E. 3. 46. 62]

Br. Receipt, pl. 99. cites

S. C.—In writ of error, he in reversion shall be received. Per Rolf, anno 8 E. 3. ad quod nemo respondit. Br. Receipt, pl. 55. cites 8 H. 6. 2.

[11. In a writ of error to reverse a common recovery, the feme shall be received upon default of the baron, she being tertenant of the land with her baron, because she is to lose the land, if the common recovery be reversed. Tr. 11 Car. B. R. between the Earl of Oxford and Muschamp, and his feme, this was a doubt, and debated.]

[12. In assise, he in reversion shall not be received; for none shall

* Br. Rescript, pl. 98. cites S. C.—Ibid. in pl. 71.—S. P. Per Netwon, Br. Rescript, pl. 124. cites 14 H. 6. 22. shall be received in this writ but he who is party to the writ. 22 E. 3. 10. b. * 22 Aff. pl. 27.]

[13. But if an assise be brought against lessee for life, and him in reversion, he in reversion shall be received upon default of the lessee, because he is named in the writ. 22 Aff. 27. 22 E. 3. 10. b. admitted. 28 Aff. 22. Per Curiam; for this is not against the supposal of the writ.]

[14. In writ of mesne, he in reversion shall be received upon default of the lessee. 30 E. 3. 7. b.]

* Br. Rescript, pl. 72. cites S. C. Per Skip.—Jenk. 79. pl. 56. cites 4 H. 5. Fitzh. Rescript, 157. [15. [So] in a writ of mesne against baron and feme, the feme shall be received upon default of the baron, because she is to have a perpetuity charged, and to be forejudged. 4 H. 4. pl. 20. 18 E. 3. 38. Curia. 30 E. 3. 7. b. * 24 E. 3. 31.]

[16. But if in this writ, the baron and feme plead to issue not distrained in their default, the feme shall not be received, because by the issue the acquittance is acknowledged, and the inquest is to be taken only in right of damages. 30 E. 3. 28. b. adjudged.]

[17. But in writ of mesne against the baron and feme, if they deny the seignior, and after make default, the feme shall be received; for now she is to have a perpetuity charged. 30 E. 3. 29. b.]

Br. Rescript, pl. 72. cites S. C. Per Skip.—[18. In a quare impedit against baron and feme, the feme shall be received upon default of the baron; for this favours of the realty, and the inheritance is to be recovered by it. 24 E. 3. 31.]

S. P. Br. Rescript, pl. 64. cites 22 H. 6. 38. Per Port.—S. P. Br. Rescript, pl. 121. cites 22 H. 6. 30. Per Port.—So in assise of darrein presentment against baron and feme, the feme was received by default of the baron, notwithstanding that advowson is not properly land or tenement. Br. Rescript, pl. 62. cites Trin. 11 E. 3.

Br. Rescript, pl. 72. cites S. C. Per Skip. which [19. [So] in a writ of right of ward against baron and feme, the feme shall be received upon default of the baron; for this action favours of the realty. Dub. 24 E. 3. 31.]

Seion denied.—In writ of right against baron and feme, they appeared and joined the wife, &c. and after the baron made default, and the feme was received; quod nota. Br. Rescript, pl. 117. cites 44 E. 3.—Br. Droit, pl. 4. cites 44 E. 3. 24. S. C.

† [62]

Br. Rescript, pl. 72. cites S. C. The scire facias was sued against [20. In a scire facias against baron and feme to have execution of damages recovered in an assise against them, the feme shall be received upon default of the baron, though no franktenement is to be recovered thereby. 24 E. 3. 3. Quare.]

the recoverors, and upon their being returned dead, another scire facias issued; the heir, and the tenants, and the baron and feme, were warned as tertenants; and upon default of the baron the feme was received by award, to prevent execution of a chattel.—In scire facias against baron and feme, the feme was received in default of the baron. Br. Rescript, pl. 19. cites 42 E. 3. 2.—In scire facias, if the tenant makes default after default, he in reversion shall be received; for here the land is to be lost as well as upon default after default in præcipe quod reddat. Br. Rescript, pl. 128. cites 45 E. 3. 16.

Rescript,

Resceit, &c. shall be granted in a *scire facias*, notwithstanding the words (other solemnities of court mentioned in statute W. 2. cap. 45.) For solemnitates Curie are properly delays, in respect of the judicial proceedings of Court, and those words extend not to the right of the party to be received, &c. 2 Inst. 470.

[21. If it be found by office, that J. was seised of certain land, and became indebted to the king, and that A. is now tenant, and upon this a *scire facias* issues against A. who makes default, though A. be but lessee for life, yet he in *reversion* shall not be received, because no *franktenement* is in demand, but the land is to remain in the hands of the king but for a time. 50 Aff. 5. adjudged.]

* Fol. 438.
Br. Resceit, pl. 106. cites S. C.

22. In *attaint* one was received to defend his right. Br. Resceit, pl. 88. cites 14 Aff. 2.

Br. Resceit, pl. 102. cites 40 Aff. 20.

23. Entry in *quod tenens non habet ingressum nisi per M.* the tenants made default after default, and he in reversion prayed to be received, and was received. Br. Resceit, pl. 70. cites 24 E. 3. 18.

24. In *cui in vita*, it was agreed that if tenant in tail after possibility of issue extinct makes default after default, he in reversion shall be received. Br. Resceit, pl. 47. cites 38 E. 3. 22.

25. In *mordancester*, the tenant made default, and one came and prayed to be received by reversion, and was received by award. Br. Resceit, pl. 22. cites 45 E. 3. 24.

Br. Resceit, pl. 85. cites 12 Aff. 31.

26. In writ of *escheat*, if the tenant vouches the baron and feme, and the voucher is accepted, and the baron makes default, the feme shall be received; for this is in open mischief of the statute. Per Wiching. Br. Resceit, pl. 25. cites 48 E. 3. 29.

27. Resceit may be in *formedon*. Br. Resceit, pl. 5. cites 3 H. 6. 41.

See S. P. Br. Resceit, pl.

38. cites 11 H. 4. 43.—pl. 40. cites 5 H. 5. 13.—pl. 48. cites 9 H. 5. 4.—pl. 44. cites 9 H. 5. 10.—pl. 50. cites 21 E. 3. 4.—pl. 60. cites 21 H. 6. 13.—pl. 69. cites 24 E. 3. 22.—pl. 73. cites 24 E. 3. 32.—pl. 75. cites 9 E. 4. 30.—pl. 112. cites 18 E. 4. 25.—pl. 129. cites 30 H. 6. 16.

28. In writ of *desceit*, he in reversion shall be received. Per Rolf, anno 8 E. 3. 2. ad quod nemo respondit. Br. Resceit, pl. 55. cites 8 H. 6. 2.

29. In writ of *entry sur disseisin*, against baron and feme, the baron made default, and the feme was received. Br. Resceit, pl. 7. cites 9 H. 6. 26.

30. In writ of *aiel* against baron and feme, the feme was received in default of the baron. Br. Resceit, pl. 62. cites 21 H. 6. 48.

31. In *dower* against baron and feme, the feme was received in default of the baron. Br. Resceit, pl. 63. cites 22 H. 6. 1.

Br. Resceit, pl. 65. cites 22 H. 6. 52.

32. Resceit may be in *cessavit*. Br. Resceit, pl. 14. cites 33 H. 6. 33.

S. P. Br. Resceit, pl. 17. cites 40 E. 3. 27.—pl. 23. cites 48 E. 3. 13.

33. In writ of entry in the post, upon default of the vouchee, one N. came and prayed to be received. Pollard held he should be received; but Fitzherbert contra; for the statute gives rescit upon default, or reddition of the tenant, and not of the vouchee; and this he held for law, and so it has been held before this time; quod nota. Br. Rescit, pl. 67. cites 14 H. 8. 4.

*** (G) In what Cases Receipt shall be in the Action.**

[1. **I**F baron and feme vouchees enter into the warranty, and make default, the feme may be received, though the writ be not brought against the baron and feme. 12 H. 6. 6. b. 18 E. 3. 38. 38 E. 3. 9. b. adjudged.]

Lord brought writ of entry upon default of his rent-service, and the tenant made default

[2. In a writ of entry of a rent against baron and feme, though the feme be seised in fee of the land out of which the rent issues, yet upon default of the baron, she shall be received, though the land be not in demand, but only a rent out of the land; because otherwise she shall hold the land charged with rent. 21 E. 4. 53. adjudged.]

after default, and he in reversion came and said, That he leased the land to the tenant for life, and prayed to be received, and was received of the land where rent was demanded, and not the land, quod nota; for he may traverse the title. Br. Receipt, pl. 111. cites 10 E. 4. 9.

[3. In writ of dower of a rent against tenant for life, who makes default after default, he in reversion of the land shall be received, though the land is not in demand but a rent out of it. 19 E. 3. Rescit, 14.]

4. It was said, That it is adjudged P. 13. E. 3. That if rent be demanded against tenant for life of the land, he in reversion of the land shall be received, though the land is not to be lost; for it is to be charged, which is such like mischief; quod nota, and this by equity. Br. Rescit, pl. 123. cites 19 E. 3. Fitzh. Rescit, 14 & 9 E. 4. 40.

(G. 2) How. For Part. And done upon Receipt what may be.

So in cessavit against three, who made default after default, and at the grand cape waged their law of non-summons, and at the day a came,

[1. **I**N cessavit against three, two made default after default, and the third appeared, and said That J. N. was seised, and infeoffed them, and to the heirs of him, and prayed to be received for two parts, and was received and tendered the arrears for the whole, and was compelled to find surety for two parts, and not for the third, because he is party to the writ for a third part, and has power to render and lose it, and of those two parts he cannot go without surety, though he is named in the writ, quod nota, and the reason aforesaid. Br. Rescit, pl. 17. cites 40 E. 3. * 27.

and the third made default, and therefore came J. N. and prayed to be received of the third part because he leased to the three for life, the reversion in him; and the demandant traversed the lease, but

but at last he traversed the reversion, that nothing in reversion the day of the writ purchased, and the issue, taken accordingly, and he found surety of the issue; and this seems to be but of the third part of which he is received, and the other two waged their law for the two parts, and the writ abated for the 2 parts, and stood for the rest. Br. Resceit, pl. 23. cites 48 E. 3. 13.—* All the editions are (27) but I do not observe such point there. But see 40 E. 3. 40. pl. 20.

2. In assise, he in reversion named in the assise was received for feint pleading without shewing cause of the feint pleading, and yet the plaintiff may join issue with the tenant for life, or with him in reversion. Br. Resceit, pl. 36. cites 11 H. 4. 3.

3. He who comes a latere, and is received, his cause shall be entered; contra of the feme, who is party to the writ. Br. Resceit, pl. 14. cites 33 H. 6. 53.

(H) Receit by him in Reversion. At what Time he [64] shall be received. See (K) (O)

[1. IF a lessee makes default, he in reversion shall not be received before the default recorded. 11 H. 6. 52.] Br. Resceit, pl. 131. cites 11 H. 6. 52. S. C. per Cur.

(I) Receit by Femmes Covert. At what Time. See (K) pl. 18, 19.—(L)

[1. THE feme shall not be received upon default of the baron, till the land shall be lost by such default if she be not received. 15 E. 4. 10. b. Per Curiam.]

[2. In a præcipe quod reddat against baron and feme, who plead to issue, and at nisi prius both make default. At the day in the bank the feme shall not be received; because the land is not to be lost by this default, but a petit cape is to be awarded, and so she comes too soon. 15 E. 4. 10. b. Per Curiam adjudged.] Br. Resceit, pl. 66. cites S. C. S. P. And at the petit cape she may be received. But in scire facias against baron and feme, who pleaded to issue, and at the nisi prius were demanded, and did not come, and at the day in bank she prayed to be received, and was received, quod nota. Br. Resceit, pl. 32. cites 7 H. 4. 15. And concordat 15 E. 4. 10. in scire facias, because the land is to be lost by this default.

[3. [So] in a præcipe quod reddat against baron and feme, if they make default at the summons, yet the feme shall not be received. 7 H. 4. 37. b.]

[4. So she shall not be received till the day of the grand cape returned. 7 H. 4. 37. b.]

[5. If baron and feme are vouched, and make default after default, before entry into the warranty, yet the feme shall be received. 30 E. 3. 29. b.]

[6. Assise against baron and feme; they pleaded in bar, and acknowledged an ouster; and the plaintiff traversed the bar, and after the baron made default, and the feme was received and pleaded the same plea; and the plaintiff traversed it; and the assise found for the plaintiff; and that he was seised and disseised, but that there is no disseisor named in the writ. Per Digg, The baron by his plea acknowledges an ouster, and the feme has maintained the same plea;

plea; and so disseisor by confession. Per Tank, The assise was not taken upon the plea of the baron, and *when the feme was received the baron was out of court*, and his plea not of record in prejudice of his feme, and a feme covert cannot be said a disseisor by her plea; which Belknap agreed. Et adjournatur. Br. Assise, pl. 24. cites 44 E. 3. 23.

§[65]

Br. Resceipt, pl. 28. cites S. C. But there it is said, That after the resceipt she prayed to make attorney, and could not; tamen quere.

Br. Resceipt, pl. 33. cites S. C.—So where the baron and

feme plead to the assise by balliff, and the jury remain for default of jurors, and at the day the baron makes default, the feme shall be received. Br. Assise, pl. 210. cites 17 Aff. 12.

7. Assise against J. and K. his feme and A. founded upon assise of novel disseisin, in which they lost; and the baron and A. made default, and K. was received. Br. Resceit, pl. 105. cites 50 Aff. 4.

8 Assise against baron and feme, and several others, by an infant; the baron and feme took the whole tenancy, and pleaded a release of the ancestor of the infant, bearing date in London, which is a foreign county; and because the plaintiff was an infant, they adjourned the assise into C. B. to try the circumstances; and at the day the feme prayed to be received, because the baron made default, and was received, notwithstanding that some said, That they had no power but to try the deed or remainder of the assise in the county, &c. and after the receipt she would have § made return, and could not; tamen quere. Br. Assise, pl. 45. cites 3 H. 4. 18.

9. Assise against baron and feme, who pleaded a record in bar, and had a day to certify it, and failed at the day, and the feme prayed to be received, and was received. Br. Assise, pl. 48. cites 7 H. 4. 16.

(K) Receit by him in Reversion. At what Time.

[1.] F tenant for life makes default after the 4th day, yet he in reversion shall be received. 17 E. 3. 3.]

So where formedon

• Fol. 489.

was brought against to-

nant for term of life, who prayed aid of him in reversion, who joined and pleaded, and after made default, and yet he himself came after and prayed to be received by the reversion, and was received; and so default and appearance of one and the same person, but it was at divers days. Br. Default, pl. 101. cites 24 E. 3. 24.

[2. If lessee for life in action prays aid of the reversion, who upon summons makes default, and after the lessee makes default, he in reversion may be * received thereupon, notwithstanding the first delay; for the aid was but to aid the tenant, not to plead. 6 H. 4. 3. adjudged.]

[3. If lessee for life vouches the reversioner, who upon summons makes default, and at the day of the grand cape returned lessee makes default; and if he makes default upon the petit cape, the reversioner shall be received, notwithstanding his default before. 6 H. 4. 3. b.]

[4. If lessee for life pleads jointly with his lessor, who makes default, being warned upon scire facias, yet after, upon default of the lessee, he sha lbe received. 6 H. 4. 3. b.]

[5. If

[5. If after aid granted, and joinder and pleading of him in reversion, the tenant makes default, he in reversion shall be received. 24 E. 3. 23. adjudged.]

[6. But if [lands are given] to baron and feme, and to the heirs of the baron [if the baron] makes default, and feme is received and after makes default, the baron now shall not be received by [reason of] his first default, and there are no moieties. 6 H. 4. 3. b.] But after default by baron and feme, if the feme be received, and after makes default, another may come and say, That she has nothing in reversion but for term of life, the reversion to him, and shew deed, and pray to be received, and shall be received; quod nota, that as long as they come before judgment, any who has in remainder or reversion immediate, may pray to be received. Br. Receipt, pl. 39. cites 5 H. 5. 10.

[7. If lessee for life makes default after default, and this is recorded, he in reversion shall not be received after, because he has surceased his time; for the judgment shall have relation to the default. 10 H. 6. 6. Contra 38 E. 3. 22. b. Adjudged.]

[8. If judgment be to be given against lessee upon 2 defaults, and after it is adjourned till another term, at this term he in reversion shall not be received; for though he comes before judgment, yet he does not come in due time *paratus petenti respondere*. 9 H. 6. 37.]

[9. In *præcipe quod reddat* against tenant for life after issue, if he makes default at the *nisi prius*, he in reversion may be received at the day in bank, though he did not proffer himself at the *nisi prius*; * because in this writ the land is to be lost upon process of petit cape. 19 H. 6. 21. b. Because a petit cape is to be awarded.] Br. Receipt, pl. 57. cites S. C. Per Newton. [66]

[10. And he in reversion shall be received in all cases at the day in bank, unless in waste, though he did not proffer himself at the *nisi prius*. 19 H. 6. 21. b.]

[11. [So] he shall be received in a *scire facias* at the day in bank without proffer at the *nisi prius*, though the land is to be lost in this writ without other process. 19 H. 6. 21. b.] Upon *scire facias* he ought to tender receipt at the *nisi prius*; for there a default after appearance or garnishment is peremptory, and no further process is there to be awarded. Contra in *præcipe quod reddat*; but the same law in action of waste as *scire facias*. Per Newton. Br. Receipt, pl. 57. cites S. C.

Tenant in tail after possibility of issue made default at the *nisi prius* in *scire facias* upon a fine, and he in reversion prayed to be received in bank, and was received, and prayed his age, and was viewed and judged of full age. Br. Receipt, pl. 37. cites 11 H. 4. 14.

[12. But in writ of waste he shall not be received at the day in bank without proffer at the *nisi prius*. 19 H. 6. 21. b.]

[13. In assise against 2, who are seised to them and the heirs of one of them, and after the assise is awarded for their default, but remitted to take it till another day, yet at this day he who has the fee may be received. 18 E. 3. 51. Adjudged.] So in assise against two of rent, scil. T. and J. and the said J. made default, and the assise awarded against him by default, and T. vouched record, and had day to bring it in the next day, and at the day made default; upon which came J. named in the writ, against whom the assise was awarded, and shewed how the said T. held of him for term of life, the reversion to him, and prayed to be received, and was received, notwithstanding the assise was awarded by his default, and that he prayed of the land where rent is in demand; and so another thing in demand. Br. Receipt, pl. 71. cites 24 E. 3. 29.—S. P. Br. Default, pl. 101. cites 24 E. 3. 38.

fault, and the assise awarded against him by default, and T. vouched record, and had day to bring it in the next day, and at the day made default; upon which came J. named in the writ, against whom the assise was awarded, and shewed how the said T. held of him for term of life, the reversion to him, and prayed to be received, and was received, notwithstanding the assise was awarded by his default, and that he prayed of the land where rent is in demand; and so another thing in demand. Br. Receipt, pl. 71. cites 24 E. 3. 29.—S. P. Br. Default, pl. 101. cites 24 E. 3. 38.

[14. If

• Br. Receipt, pl. 93. cites S. C.—

In *præcipe quod reddat*, the tenant made attorney, and after *conusance* was demanded of the plea, and was

[14. If the tenant be *essoigned* where he has attorney in the plea not *essoigned*, upon which the demandant demurs, and judgment erroneous is given against him, scil. That he take nothing by his writ where they ought to award seisin of the land, upon which the demandant brings writ of error against the recoverer, who is only lessee for life, in which the judgment is reversed, he in reversion may be now received, though the judgment ought to be, That the demandant in the first action shall recover seisin of the land upon the default; because he comes before judgment, and he could not be received before. * 21 Aff. pl. 17. 21 E. 3. 46. 62. Adjudged.]

granted, and day given in the franchise, and there the tenant cast *essoign*, and the demandant challenged it, because he had attorney in bank who is not removed, and the franchise did not allow it, by which the demandant brought writ of error. And the opinion of the Court was, That it is error, and that they ought to award seisin of the land or *petit cape*; by which came N. and prayed to be received, and was not received till it was adjudged if it was error, or not; and after it was adjudged error, and he prayed again after to be received, and was received; quod nota, after judgment of reversal; but he came before judgment of the seisin of the land, or any other award. And so it seems that by the reversal the record is become in such plight as if no error had been, and then the Court may proceed as the first court ought to have done, and so he came now time enough. Br. Receipt, pl. 54. cites 21 E. 4. 45.

[15. If there be a default 2 or 3 days before he in reversion prays to be received; yet if he comes before judgment, and any adjournment, he shall be received. 29 E. 3. 48.]

In *præcipe quod reddat* the tenant confessed the action, and the Court took day of advisement,

[16. If lessee for life gages his law of non-summons, and makes default at the day, that he ought to make his law, at which day he in reversion prays to be received by attorney by force of the king's writ commanding it; and the Court rests in advisement 3 days, whether or no there be variance between the writ and record, and after the third day a good writ comes without variance, he in reversion may well be received at * this day upon this writ, because there was not any adjournment before, though there was a default. 29 E. 3. 48.]

* Fol. 440.

and at the

day he in reversion came, and prayed to be received, and could not, but seisin of the land awarded; for the day of advisement was the act of the Court. Br. Office del, &c. pl. 14. cites 43 H. 6. 19.—Br. Receipt, pl. 12. cites S. C. But per Danby, if he who prays dies, there, at another day after, his heir, if he prays, shall be received; for he had no day to pray before; quod non negatur.

§[67]

Br. Receipt, pl. 99. cites S. C.

[17. In real action, if the tenant vouches, and an *essoign* of the service of the king is cast for the voucher, at the return of the summons ad warrantizandum, and after, he does not bring his warranty at the day, and then the tenant is *essoigned* of service of the king, and after he does not bring his warrant at the day, the vouchee may say at this day, that the tenant is but tenant for life, the reversion to him, and he shall be received; for now judgment is not to be given upon his default, but upon the default of the tenant. 23 Aff. 15. Adjudged.]

Seire facias against baron and

[18. At the day of the *petit cape* returned, if the *hæron* makes default, there the *feme* shall be received. D. 1. 2. Ma. 103. 8.]

feme, who made default at the *nisi prius*, and the *feme* was received at the day of *petit cape*. Br. Receipt, pl. 19. cites 42 E. 2. 2.

[19. If

[19. If baron and feme make default after default, upon which comes a stranger, and says, That the feme was tenant for life, the reversion in fee to him; and prays to be received, and is received, and after he makes default after default also, the feme shall not be received after, because she has surceased her time. 2 H. 4. 2.]

20. In præcipe quod reddat, the tenant made default, and came he in reversion, and said that the tenant held in dower the reversion to him, and prayed to be received. Chelr. said, Yesterday the tenant was demanded, and did not come, and so comes too late, because he stayed till the day after. Caund. said No; for he is time enough, because he comes before judgment given; by which he was received; but first the tenant was another time demanded, and did not come; and so it appears that the default was not recorded before. Br. Receipt, pl. 46. cites 38 E. 3. 22.

* ((H)) [L] Receipt by Feme Covert. At what Time.

See (I) —
* N.B. This
In Roll is
(H) and so
the letters
proceed
there, but
(H) (I) and
(K) being
all in Roll

[1. THE feme shall not be received upon default of the baron, unless the same day that she prays to be received, the baron might have pleaded if he had come in. Dubitatur. 3 H. 6. 29.]

as before, the alphabet is here continued on by the additional letters of (L) (M) &c. which last letters are to be observed as the letters referred to.

Br. Receipt, pl. 4. cites 3 H. 6. 28. Per Martin, according to Roll. But says, Vide 3 H. 4. 111 The baron made default at the nisi prius in præcipe quod reddat, and the feme was received at the day in bank.

[2. If baron and feme make default in the term in bank, the feme shall not be received after, though she comes the same term before judgment. 3 H. 4. 13. b. Contra 18 E. 3. 1. admitted.]

[3. In action of waste against baron and feme, if the feme comes in upon the grand distress, upon default of the baron she shall be received. * 2 H. 4. 2. 7 H. 4. 38.]

* Br. Re-
ceipt, pl.
26. cites
S. C. —
Waste

against baron and feme, who held for term of life, and at the writ of enquiry of waste returned served the baron made default, and the feme came, and prayed to be received, and was ousted of the receipt by award after good argument; for the award is as a judgment, and the party shall not make the thing to be tried again, which was tried before. Br. Receipt, pl. 26. cites 2 H. 4. 2. —
Br. Walte, pl. 58. cites S. C.

The feme came in after the writ to inquire if the waste was awarded, and returned served; but non adjudicatur: but it was not denied, that if she had come in before the writ to inquire of waste awarded, but that she should have been received. Br. Receipt, pl. 4. cites 2 H. 4. 28. —
Some held, that she ought to have prayed it at the grand distress returned; but others held that she may be received now. Et adjournatur. Ideo quare. Ibid. pl. 35. cites 7 H. 4. 37. And says, Tamen vide. 7 E. 3. Fitzh. 32. the feme was received in waste as above; and 34 E. 3. Fitzh. 289. accordingly.

[68]§

[4. After the inquest taken in redisseisin upon default of the baron and feme, and before the return, the feme shall not be received. 7 H. 4. 38.]

[5. After a judgment by default, and writ awarded to inquire of damages, the feme shall not be received. 7 H. 4. 38.]

[6. If

* Br. Re-
sceipt, pl.
85. cites
7 H. 4. 37.

[6. If upon default of baron and feme a *stranger is received because of the reversion, and after he makes default* after default, the feme shall not be received; for she has surceased her time. 2 H. 4. 2. * 7 H. 4. 38. For once the feme was out of the benefit of the statute. 22 E. 3. 44. adjudged.]

In assise
against ba-
ron and
feme, the
baron

[7. *After assise taken by default of the baili of baron and feme,* the feme shall not be received. Contra 1 E. 3. 13. b. But quære.]

pleaded to the assise by bailiff, and the feme came and prayed to be received, and was received per Shard, and yet out of the case of the statute. Br. Receipt, pl. 84. cites 12 Aff. 26.

* Br. Re-
sceipt, pl.
86. cites
S. C.—

[8. [So] after assise by default *against baron and feme* the feme shall not be received. * 2 H. 4. 2. b. 3 H. 4. 13. b. 7 H. 4. 38. 3 H. 6. 29. 30 E. 3. 28. b. Contra 1 E. 3. 13. b. But quære.]

In an assise
of mort-
dancest

[9. *Nor after award thereof* shall she be received. Contra 3 H. 6. 8. b.]

against the husband and wife, if the *assise be awarded by default*, and after the baron makes default before the principal judgment, the wife may be received; and so in the assise of *novel disseisin*. 2 Inst. 343.—11 Rep. 69. a. in METCALF's Case, cites 22 E. 3. tit. Rescript, 139. and says that with this accords 17 E. 3. Rescript, 173. and 22 Aff. 22. After assise awarded feme was received. 24 E. 3. 29. b.

And albeit she comes not at the time of the default, yet if she comes *before judgment she shall be received, and so of him in the reversion or remainder.* 2 Inst. 343. 344.

Br. Assise,
pl. 299.
cites 29 Aff.
26. accordingly.

[9. *Nor after award thereof* shall she be received. Contra 3 H. 6. 8. b.]

* In such
case in mort-
dancest at
another day
the feme
was receiv-
ed to defend
her right
by award.

[10. *So after award thereof, and it remains for default of jurors,* she shall be received. 17 E. 3. Rescript, 173. adjudged.] 12 Aff. 31. adjudged in mortdancest. Dubitatur, 29 Aff. 36. 22 Aff. 11. Quære. * 12 E. 3. Rescript, 140. adjudged in mortdancest. Contra 24 E. 3. 29. b. yet there it was afterwards adjudged, that it lies for him in reversion.]

Br. Rescript, pl. 85. cites 12 Aff. 31. & Itin. Bed. accordingly.—So in *assise against baron and feme, which remained for default of jurors, and at the day the baron made default, and the feme prayed to be received, and was received notwithstanding the statute, by the default, and the land is not merely to be lost by default in assise, but by jury.* Br. Rescript, pl. 100. cites 25 Aff. 14.

But Br. Assise, pl. 299. says, That a feme cannot be received after such award; for such award is a judgment; cites 3 H. 6.

S. P. And
by some
she might
have been
received at

[11. In *assise, if baron and feme pleads to the assise by baili, and after it remains for default of jurors, and then the baron makes default,* the feme shall be received. 17 Aff. 12.]

the day when the bailiff pleaded; quære inde; for there is no default, and also the plea of the bailiff is the plea of the baron, which she cannot deny. Br. Rescript, pl. 92. cites S. C.

* Fol. 441.
But in waſt
against ba-
ron and feme

[12. If the *feme prays to be received at nisi prius* upon default of the baron, * *she shall be received in bank; for the justices of nisi prius have no power to receive her.* 2 H. 4. 2. 3 H. 4. 1. b. adjudged. 4 H. 4. 1. b. 7 H. 4. 38. b. 19 Aff. 5. adjudged.]

of a lease for life made to the feme, they were at issue upon no waſt done, and at the nisi prius, the baron made default, and the feme appeared, and said, that the place where the waſt is assigned

assigned in her franktenement, and prayed to be received, &c. and was received and pleaded several bars, and the plaintiff replied; quod nota bone in wast. Br. Resceipt, pl. 61. cites 21 H. 6. 46. — Br. Wast, pl. 89. cites S. C.

Scire facias upon fine against baron and feme who made default at the nisi prius, and the default recorded, and at the day in bank came the feme, and prayed to be received, and was received, notwithstanding * that she did not tender to be received at the day in pais; for the justices of nisi prius have no power to receive her; quod nota. Br. Resceipt, pl. 27. cites 3 H. 4. 13. — And yet 2 E. 4. fol. 10. Petit cape shall be awarded, and then she shall be received, and not before; but this is not the process in scire facias. — In such case upon scire facias at the day in bank the feme may be received; for at this day the land is to be lost. Br. Resceipt, pl. 66. cites 15 E. 4. 10.

[13. So if she appears at the nisi prius, though she does not pray S. P. Br. Resceipt, pl. 78. But to be received. 14 H. 6. 2. b.]

where at the nisi prius the baron and feme made default, and at the day in bank the feme prayed to be received by default of her baron, the Court held that she shall not be received; for the day in bank, and the day of nisi prius are one and the same day, and the feme cannot appear, and make default all at one and the same day; cites S. C.

[14. So it is if the feme does not pray to be received at the nisi prius, nor appears there; because the justices of nisi prius have no power to allow it if she had prayed it. 3 H. 4. 13. adjudged. 7 H. 4. 15. b. adjudged 38. b. 18 E. 3. 16. b. adjudged. Contra 3 H. 4. 2. 41 Aff. 29. Contra 14 H. 6. 2. b. Curia.] S.P. a Insts 343, 344. but says that the safest way is to pray it there.

[15. After the grand cape, or * petit cape awarded, the feme shall be received. 3 H. 6. 29.] * S. P. at the day of the petit cape

she shall be received; for then the land is to be lost, and not before. Br. Resceipt, pl. 78. cites 15 E. 4.

[16. If baron and feme make default at the grand cape, which is recorded, and day given over to be advised, the feme shall not be received after. 3 H. 4. 13. b.]

[17. So if baron and feme make default at the petit cape returned, and the default recorded, and this adjourned for any cause, the feme shall not be received after. 30 E. 3. 28. b.]

[18. The same law, though it be adjourned upon the essoin of the demandant. 30 E. 3. 28. b.]

[19. If in assise against baron and feme all be adjourned into bank for trial of a foreign plea, and baron makes default at the day in bank, the feme may be received. 3 H. 4. 18.] Br. Resceipt, pl. 28. cites S. C. — So in assise

against baron and feme who pleaded in bar, and the plaintiff made title; and upon this they are adjourned into bank for difficulty, and the baron appeared, and after made default, and the feme was received, &c. It seems that this appearance of the baron and default was not all at one and the same day; and so see resceipt notwithstanding adjournment upon a point certain. Br. Resceipt, pl. 89. cites 16 Aff. 16.

[20. So if upon trial en pais they are adjourned to Westminster, the feme may be received after. 11 H. 4. 81.]

[21. If judgment be to be given by two defaults, and after it is adjourned till another term, the feme shall not be received this term before judgment; because she did not come parata petenti respondere in due time. 9 H. 6. 37.] Br. Resceipt, pl. 8. cites S. C. — So where assise passes against ba-

ron and feme, and is adjourned for difficulty, there at the day the feme shall not be received; for it is after verdict; for there is no mesne time between verdict and judgment. Br. Resceipt, pl. 71. cites 24 E. 3. 29. per Wilby.

* Br. Receipt, pl. 33. cites S. C.—

[22. In *assise* against baron and feme, if *they plead a record, and fail thereof at the day*, yet the feme may be received. * 7 H. 4. 16. b. 10 H. 4. 9.]

Br. Parliament, pl. 9. cites S. C.—

S. C. Br. Receipt, pl. 71. cites 24 E. 3. 29. per Wilby.—See pl. 36.

[70]

[23. In *assise* against baron and feme, if *the parties demur in law upon special matter between them*, upon which they are adjourned in bank, and there the *assise* is awarded to be taken in pais; upon the *resummons* sued before the justices of the *assise*, the feme shall be received, upon default of the baron, though the *assise* was awarded before upon the demurrer. 30 Ass. 47. adjudged, and before other justices.]

Br. Receipt, pl. 91. cites S. C. Brooke says the reason seems to be that what was in bank was not properly awarding

[24. In *assise* against baron and feme, if *they plead a release dated in a foreign county*, upon which the *assise* is adjourned in banco, and the baron and feme make *default at the nisi prius, and day in bank*, by which the *assise* is awarded and remanded to take in pais, and a *re-attachment* sued, the feme may be received in pais at the day; because the award of the bank was only to be remanded, and in pais this ought to be awarded by default and the feme is come before this award. 22 Ass. 11.]

the *assise*, but a remanding of the *assise* into pais; for otherwise it shall be in vain for the plaintiff to pray the *assise* into pais again; for it appears elsewhere that *after awarding the assise the receipt does not lie*.

[25. In a writ of *mesne* against baron and feme, who *plead not distrained in their default*, if *they make default at the nisi prius, by which the inquest is taken by default, and the feme does not appear, nor pray to be received there*, she shall not be received at the day in bank; for now the judgment is to be given upon the verdict, and not upon the default. 30 E. 3. 28. b. adjudged.]

* Br. Receipt, pl. 29. cites S. C. But where baron and feme in action of

[26. So in action of *waste* against baron and feme *after the waste found before the sheriff, and returned in bank* the feme shall not be received, to avoid contrary verdicts. 2 H. 4. 2. Adjudged. * 7 H. 4. 2. Dubitatur. 3 H. 6. 28. b. Contra 3 H. 4. 13. b. 7 H. 4. 37. b. Contra 30 E. 3. 29. b.]

waste pleaded no waste done, and at the nisi prius made default, and the jury taken by their default, and found for the plaintiff, yet at the day in bank, the feme was received. Br. Receipt, pl. 63. cites 20 E. 3.

So in *waste* against baron and feme, writ of enquiry of waste was awarded by their default, and the waste found for the plaintiff, and at the day in bank the feme was received. Br. Receipt, pl. 63. cites p. 7. & H. 32 E. 3.

But in action of *waste* against H. and his wife; after issue joined, the parties appeared, and the plaintiff had a verdict. At the day in bank the Court was moved that the wife might be received, but it was rejected as a strange motion. Hob. 177. pl. 202. Trin. 14 Jac. Bell v. Hartley.

* Fol. 442.

[27. In action of *waste* against baron and feme, and *no waste done pleaded*, * the feme shall be received *after the inquest taken, and before judgment*. 22 Ass. 11. 28 E. 3. 91. Adjudged.]

* The word in Roll is (il) which is (he) but it should be (el) which is

[28. In an action against baron and feme, if *profession be alleged in the demandant, and it is certified by the ordinary, That * he is not professed, and at the day of the certificate the baron makes default*, the feme shall be received. 21 E. 3. 39. For the *assise* is to be awarded of the seisin and disseisin, and not in right of damages

images only. (But quære ceo.) 21 E. 3. 39. 59. b. + 21 Aff. (the) viz. pl. 20. Contra 41 Aff. per Curiam upon certificate of bastardy.] the de- mandant, and so is Br. Rescript, 53. which cites 21 E. 3. 38. and so also is the year-book of 21 E. 3. 38. b. 39. pl. 38. so that it is here misprinted.

+ Br. Rescript, pl. 94. cites S. C. and there per Thorpe the feme cannot be received; for the judgment is not to be given by default, but upon the certificate; but per Stouf. the assise shall be awarded upon the seisin and disseisin, so she shall be received; but by the reporter the assise shall be awarded in right of damages, because their plea is found against them by record, quære of the rescript, and see the statute.

[29. In assise by A. against baron and feme, who plead that J. was seised in fee, and died; and that the feme is his heir, and the plaintiff A. claims as heir to J. where he is a bastard, and issue whether bastard or not, &c. And upon this it is certified by the ordinary, That he is a mulier and not bastard, and then the baron makes default, and the feme prays to be received, and because the ordinary did not return the writ with the certificate, it was adjudged as no certificate, and so the feme received. 41 Aff. 29. Adjudged. But there said, That * if the writ had been returned with the certificate, the plaintiff ought to have had seisin of the land, and the feme not received.]

Br. Rescript, pl. 103. cites S. C. For where issue is found against the defendant by jury or certificate, the feme cannot be received, quia veniet parata potenti respondere, and she cannot answer after issue tried, or certificate, quod nota.

[71]*

[30. In action against baron and feme and a 3d person, if they all wage their law of non-summons, and at the day which they have to make their law, the baron and the other make default, the feme, notwithstanding the joint wager of law with the 3d person, may take upon her the intire tenancy, and be received of the whole. 21 E. 3. 13.]

Br. Rescript, pl. 52. cites S. C. For this wager of the law is the act of the baron, and not of the feme.

[31. As a petit cape returned against baron and feme, if the baron casts an essoin of service of the king, where he has an attorney in court who is not essoined, though he does not bring in his warrant of essoin at the day given to him; and though the feme does not offer herself to be received at the casting of the essoin, yet she may be received at the day given for bringing in of the warrant; because she could not be received before, the baron not having made any default, nor the land to be lost then. 2 E. 4. 16.]

Br. Rescript, pl. 107. cites S. C.

[32. At the petit cape returned, if the baron casts a common essoin, and the Court does not adjudge it, but adjourns it, and at the day the essoin is quashed, or if the baron does not bring in his warrant, yet the feme shall be received, though the judgment is to be given as by default at the time of the essoin cast, though the feme did not offer herself at the time of the essoin cast; because she comes before judgment. Contra 2 E. 4. 16.]

Br. Rescript, pl. 107. cites S. C. that it was held by some that she should be received. But adds quære.

[33. If a writ be brought against baron and feme and a 3d person, and upon default of baron and feme, process continues till the 3d comes and takes upon him the tenancy, and pleads, &c. so that the baron and feme are out of court, yet if the feme comes after,

At the grand cape against the baron and feme and a 3d person,

the baron and the 3d made default, and she took the intire tenancy, and prayed to be received. Theloall's Dig. lib. 13. cap. 11. pl. 40.

after, she shall be received upon her prayer. 22 Ass. 11. Contra 2 E. 3. 41. b. For the moiety of the 3d person.]

[34. In assise against baron and feme, if the plaintiff imparles upon their plea, and comes back, and then the baron makes default, the feme may be received before the assise awarded. 20 Ass. 16. Adjudged.]

But in assise against baron and feme, they pleaded jointenancy by deed, and were at issue; and after the baron made default, and the feme would be received as jointenant with another, and was ousted. Theloall's Dig. lib. 13. cap. 11. pl. 14. cites 12 E. 3. Rescript, 139.

[35. In assise against baron and feme, if the tenants plead jointenancy by deed with a stranger, upon which process issues upon the statute at the day of the return of it, the feme shall be received upon default of the baron, though the land is not to be lost upon the default. 25 Ass. 14. Adjudged.]

* Br. Rescript, pl. 101. cites S. C.—S. P. Br. Rescript, pl. 87. cites 13 Ass. 1. Brooke says, And so see that she is not disseisor by failer of the record, notwithstanding the statute of Westminster, 2 cap. 25.—Br. Parliament, pl. 31. cites S. C.

[36. In assise against baron and feme, if they plead a recovery in bar, and at the day fail of the record, by which judgment is to be given by the statute against them as disseisors, yet the feme may be received. * 26 Ass. 35. Adjudged. 7 H. 4. 16. b. 10 H. 4. 9. b.]

* F. 1. 443.

[72]

[37. If in a writ of error to reverse a common recovery brought against baron and feme, and the baron and feme are returned tertenantis octabis Trinitatis, and then they appear, and the plaintiff assigns errors, and after the baron * does not put in any plea, but makes default; upon which the plaintiff prays that the errors be examined; but afterwards in Hillary term the feme comes in, and says that it is her land, and prays to be received. Whether she shall be received, inasmuch as she comes before judgment dubitatur. Tr. 11 Car. B. R. between the Earl of Oxford and Muschampe; this was a point argued. Intratur. Hill. 9 Car. Rot. 151.]

38. Assise; if baron and feme in præcipe quod reddat, or the like, alien pending the writ against them, and the feme prays to be received for default of her baron after the alienation, and she be ousted of the rescript, by reason of the alienation, it was said by several justices, that this was wrong; quod nota; for she may plead in bar, and may have aid, and may have writ of error; and in such a case before other justices, the feme was received, and prayed aid of the king, and had it per judicium, notwithstanding the alienation. Br. Rescript, pl. 86. cites 12 Ass. 46.

And it was said that if at the first day the baron had made default, and the third being disseisor, had

39. Assise against baron and feme, and a third person, the feme pleaded by bailiff to the assise, and the baron took the entire tenancy, absque hoc, that the feme any thing had, and vouched the third person who warranted him, and pleaded record in bar, and at the day, &c. brought it in, and at this day the baron made default, and the feme prayed to be received, and was counterpleaded, because the third had warranted the land to the baron, and had entered into the warranty, and

and so the baron out of court: *et non allocatur*; for in assise he has always day in court; so that the feme had been received, if the record had not been brought in by the third, but now there is no necessity, for the plaintiff shall be barred. Br. Rescript, pl. 91. cites 16 Aff. 13. ^{pleaded release of the plaintiff of all actions, that this shall be a}
bar of the whole assise, yet if the feme prays to be received, she shall be received. Ibid.—And in assise against baron and feme, and the third, the baron suffers the third, who has nothing, to take the tenancy, and after makes default, the feme shall be received; quod nota. Ibid.

40. Assise against the baron and feme, the baron confessed that he was villein to W. N. by which the writ abated, and he brought another writ against the baron and feme, and W. N. and the baron confessed himself villein to another, and was not received against the first record, and notwithstanding he tendered that nul tiel record, by which the feme prayed to be received, and was received *ex assensu*: quære; but ought not per rigorem juris; per Knivet and Shard; for rescript is to save the franktenement, and the franktenement is put in W. N. by confession of the villeinage. But it seems to me, that she may be received; for the consufance of the baron cannot lose the franktenement of the feme but for life of the husband, and if she suffers recovery now in the assise, she shall by this be bound after the death of her husband; and so it is reason that she be received. And per Stouf. clearly, She shall be received. Br. Rescript, pl. 96. cites 22 Aff. 12.

41. In *præcipe quod reddat* the tenant made default after default, and the baron and feme prayed to be received, and the demandant pleaded nothing in reversion, and *venire facias* issued returnable presently, and the baron and feme were demanded, and the baron made default, and was *essoigned de serviciis regis*, and the feme came, and said that the *essoign* does not lie in this case, and prayed to be received, and the *essoign* was quashed, and the feme received and found surety of the issues; and the demandant pleaded nothing in reversion, &c. And so see feme covert received where her baron and she were not received before, but stood upon a counterplea of the rescript; quod nota. Br. Rescript, pl. 39. cites 5 H. 5. 10.

42. In trespass, if a feme sole leases to two for life, and the one intermarries with the feme, and they two are impleaded, and make default after default, yet the baron and feme in right of the feme, shall be received and plead for the feme; and yet he was out of court as to his own interest by the defaults. Per Newton Ch. J. [73]
quod nemo negavit. Br. Rescript, pl. 59. cites 21 H. 6. 4.

43. In formedon, the tenant pleaded non-tenure, and found for the demandant. And now the feme, after verdict, prayed to be received upon the feint plea of her baron, because he had pleaded non-tenure, where she might have traversed the gift; and he brought a writ out of Chancery *de attornat. recipiendo*, for the feme. Et per Curiam, it was received; for a feint pleading is a feint pleading, and a feint pleading is within the statute. And here there needs not any new declaration, because the feme is party to the suit. Otherwise it is, where he in reversion is not party to the suit, and is received. Cro. E. 826. pl. 30. Pasch. 41 Eliz. in C. B. Grefwold v. Holms.

* See the
note at
((H)) [L]
next before.

*((I)) [M] In what Cases it lies *against the Supposal of the Writ.*

[1.] **I**N a *præcipe quod reddat* against J. S. who makes default after default, and he in *reversion shews* for cause of receipt, that he leased the land to the said J. S. and one J. D. he shall be received, though it be against the supposal of the writ; for though the defendant will not abate the writ, yet it is not reasonable that this shall oust him in reversion of his rescript. 30 E. 3. 6. Adjudged.]

2. The prayor to be received *in cui in vita* cannot plead to the writ, by falsifying the title of the demandant supposed by the writ. Theolall's Dig. Lib. 13. cap. 11. pl. 39. cites M. 6 E. 2. Rescript, 167.

3. In *cessavit* against baron and feme, who pleaded open and sufficient to his distress, and after the baron made default at the petit cape, and the feme shewed cause, and prayed to be received, inasmuch as she held for term of her life of the lease of A. And notwithstanding the contrariety, she was received, and after pleaded the same plea to the writ; and the demandant maintained that they held of him as the writ supposed. Br. Rescript, pl. 62. cites Trin. 8 E. 3.

4. Entry in *quod tenentes non habet ingressum*, unless by M. The tenants made default after default, and came he in reversion, and prayed to be received, viz. M. and his feme, supposing that they leased to the tenant for life the reversion to them, and were received, notwithstanding that the entry of the tenant by the writ is supposed; and they said that M. and his feme leased, which goes to the writ, and yet they were received; but first the demandant said that the tenant had nothing of the lease of the feme: et non allocatur; for it is dubious if it be the lease of a feme covert to the lay gents, but it is her lease for the time; for by the receipt of the rent after the death of the husband, the lease is affirmed, and therefore no counterplea; by which he said that the baron was sole seised, *absque hoc*, that the feme any thing had; and the others e contra; and upon this they made attorney: and so note, that upon issue joined the prayee to be received may make attorney. Br. Rescript, pl. 70. cites 24 E. 3. 18.

5. In *formedon* against baron and feme, who made default after default, and came R. and said that the tenements are in the vill of D where the youngest is inheritable, and that N. his father was seised, and leased to the baron and feme for life, and died, and the reversion is descended to R. as youngest son, and prayed to be received. Kirton said he ought not to be received; for pending the writ the said R. has entered, and leased to the baron and feme, and one T. for life, and so this reversion by which he prays, &c. is discontinued; and because the demandant himself has brought his writ against them, and this act pending the writ cannot abate it, therefore the demandant

demandant shall not contradict his own writ; and therefore he shall be received by the first reversion; and so it was awarded, and he vouched to warranty. Br. Counterplea de Resceipt, pl. 4. cites 38 E. 3. 10.

6. In *præcipe quod reddat*, the baron made default after default, and came the feme, and prayed to be received; and said that her baron had nothing the day of the first writ purchased, nor ever after; & non allocatur; for this is contrary to the resceipt; quod nota, by award. Br. Resceipt, pl. 3. cites 3 H. 6. 20. So to say that her baron is dead. Ibid.— And also it seems if the writ was brought against both when the feme was sole, and they intermarried pending the writ, that this is no plea; and yet the plea is true, but the writ is made good there. Ibid.

(M. 2) By Attorney.

1. **O**NE may be received by attorney by a special writ affirm-
ing infirmity; and the words of the statute are general.
2 Inst. 345.

2. In *attaint* one was received to defend his right, and made such warrant of attorney, *R. W. qui admissus est ad defensionem juris sui po. lo. suo F. de T. versus, &c. de placito jurat. 24 Militum ad convincend. 12 de placito terræ.* Br. Resceipt, pl. 88. cites 14 Aff. 2.

3. Upon *issue joined* the prayee to be received may make attorney. See Br. Resceipt, pl. 70. cites 24 F. 3. 18.

4. A man recovered damages in *assise*, and sued thereof *scire facias* against *W. F.* the sheriff returned *mortui sunt*, by which issued *scire facias* to warn the heir and tertenants, and the baron and feme were warned as tertenants, and the baron made default, and came the feme, and prayed to be received, and she was received by award to prevent execution of a *chattle*; quod nota; and the feme brought writ to receive attorney *ad prosequend. admissionem, & defendendum executionem.* Br. Resceipt, pl. 72. cites 24 E. 3. 31.

5. *Assise* against baron and feme; and several others, they were adjourned into bank, and at the day in bank the baron made default, and the feme prayed to be received, and was received; and after the resceipt she prayed to make attorney, and could not; *tamen quære.* Br. Resceipt, pl. 28. cites 3 H. 4. 18.

6. *Scire facias* against baron and feme, the baron made default, and the feme was received by attorney by writ of Chancery, which testified that she was sick, and pleaded recovery by a stranger by elder title upon *nient dedire*, who has sued execution. Judgment of the writ, and no plea; because it is not by action tried. Br. Resceipt, pl. 31. cites 7 H. 4. 15. Br. Brief, pl. 108. cites S. C.

7. Special writ came to receive a feme by attorney, who was ensient, if the baron made default at 15 Mich. &c. and at the said 15 Mich. the sheriff returned no writ, by which issued alias at another day; at which day the baron made default, and the feme by attorney prayed to be received by the first writ, and was ousted of the resceipt; for the writ does not warrant this day, but only 15 Mich. at which day no default was recorded. Br. Resceipt, pl. 8. cites 9 H. 6. 37.

8. In *præcipe quod reddat* the tenant vouched the baron and feme, who entered, and after made default, by which issued *petit cape*, and at the day the baron made default, and the feme prayed to be received by attorney by writ, which willed, *quod per testimonium plurimorum, &c. Uxor tam infirmat. quod propter periculum mortis defaultam saluare non potest, ut accepimus*; * and she was received, notwithstanding the king did not testify it but by information. Br. Resceipt, pl. 58. cites 19 H. 6. 46.

9. Dower against J. R. and M. his feme, they were at issue, and at the *nisi prius* the baron made default, and this recorded at the day in bank *Octab. Mich.* And at the same day the feme was received by writ of the king by attorney, because she was grossly ensient. Br. Resceipt, pl. 63. cites 22 H. 6. 1.

10. Where the day of the return of the writ of *nisi prius* is *Octab. Mich.* and the writ of resceipt by attorney bears date after *Octab. Mich.* yet if he comes before judgment he shall be received. Br. Resceipt, pl. 63. cites 22 H. 6. 1.

Br. Resceipt, pl. 63. cites S. C. and the demandant shall recover. Quod nota.

11. In dower it was awarded for law, that where a feme prays to be received by attorney by special writ, because she is ensient and cannot travail, if variance be between the record and the writ of resceipt she shall be ousted of the resceipt, and so she was; *quod nota bene*; but it does not appear what variance. Br. Variance, pl. 46. cites 22 H. 6. 1.

12. In *cessavit* the baron and feme tenants at the day of the grand cape returned tendered their law of nonsummons, and at the day the attorney of the demandant was *essoigned*, and the *essoignor* demanded the tenants, and the baron made default, and the feme by attorney by special writ for doubt of covin of the baron prayed to be received by attorney, and was received and pleaded immediately. Br. Resceipt, pl. 14. cites 33 H. 6. 53.

* See the note at ((H)) [L] supra.

* ((K)) [N] Receipt. In what Action.

See (A. 2) pl. 1.

[1. THE words are, *vel reddere voluerit, &c.*]

* Br. Resceipt, pl. 98. cites S. C.—Upon

feint pleader of the husband, the wife shall not be received by the opinion of Prisot; but it is resolved in 8 E. 2. to the contrary, yet I hold the law with Prisot; upon a *nient dedire*, and a *nihil dicit*, the feme shall be received within the purview of this statute. 2 Inst. 343. cites 4 E. 2. Resceipt 46.

[3. In a writ of *mesne* against lessee for life of a seignior, if he will acknowledge the action of the plaintiff, yet he in reversion shall not be received, because the judgment against the tenant shall not bind him. 30 E. 3. 29.]

4. A. and M. his wife were tenants for life, remainder to J. S. in fee, a *formedon* was brought against A. only, who made default after default; whereupon M. prayed to be received, which was denied, because *this recovery does not bind her*; and it is to no purpose

pose to defend her right in that action, which cannot be impeached here; whereupon J. S. prayed to be received, which at first the Court doubted; for if the first demandant should have judgment to recover, J. S. might falsify such recovery; because *his estate did not depend upon the estate impleaded*, viz. a sole estate, but upon a joint estate of A. & M. not named in the writ. But at last, notwithstanding the said exception, the rescript was granted. Le. 86. pl. 105. Mich. 29 & 30 Eliz. C. B. Keys v. Stedd.

* ((L)) [O] At what Time.

[76]
* See the note at ((H)) [L] supra.

[1. **I**N assise if the tenant, being a lessee, plead, feintly a false plea, and they go to issue upon the plea, and it is found false, he in reversion shall not be received after before judgment. 22 E. 3. 10. b. 22 Aff. pl. 27. adjudged.]

In assise the tenant for life pleaded deed of the ancestor of the plaintiff

in a foreign county, which was denied and adjourned into bank to be tried, and thence into the foreign county by nisi prius, and there found against the tenant, and came a stranger to the writ, and said, that the tenant had only for life, the reversion to him, and prayed to be received, and was ousted of the rescript by award; for it is said there, that it was never seen that a stranger to the writ had been received in assise. Brooke makes a quare if this be the reason, or because he came too late; for it was after verdict at which day the tenant cannot plead, and tocn cannot be paratus jus suum defendere juxta statuta. Br. Rescript, pl. 98. cites 22 Aff. 27.

2. Assise against an infant was awarded by default, and remained for default of jurors, and at another day the infant was received to plead by award; quod mirum after the assise awarded, which was a judgment; for a feme may not be received after such award. Br. Affise, pl. 299. cites 29 Aff. 36. and 3 H. 6.

Br. Rescript, pl. 126. cites S. C.

3. In præcipe quod reddat the tenant made default, and grand cape awarded and returned, and the tenant appeared, and tendered his ley gager of non summons, and bad day, &c. at which day the demandant is essoigned, and the tenant made default; and came a baron and feme, and prayed to be received; and so it seems that the rescript ought to be tendered such day, as the land may be lost in case that the demandant had appeared; and also it seems that the essoignor of the demandant might have prayed seisin of the land, in case no rescript had been tendered, &c. Br. Rescript, pl. 43. cites 9 H. 5. 10.

4. In præcipe quod reddat the tenant at the grand cape waged his law of non-summons, and at the day he was essoigned, and the demandant appeared, and at the day that the tenant had by the essoign the demandant was essoigned, and the tenant made default, and came one a latere by a reversion, and prayed to be received, because the tenant had only for term of life. Hull said, she cannot be received, for the land is not to be lost now; for here is none who prays seisin of the land. Marten said, the essoignor may pray seisin of the land, therefore she may be received. Per Hals. Yet the essoignor cannot counterplead the rescript, by which we will counterplead the rescript, as it is. Br. Rescript, pl. 80. cites 1 H. 6. 4.

* See the
note at ((H))
[L] supra.

* ((M)) [P] Counterplea. What shall be good
Counterplea.

S. P. And [1. **N**OTHING in reversion the day of the writ purchased or
so if he had after is a good counterplea. 8 H. 6. 16. 48 E. 3.
at any time 13. b.]
pending the writ, and at the time that he prays it is sufficient. Br. Resceipt, pl. 90. cites 21 H. 6. 13.

Br. Coun- [2. Nothing in reversion generally is a good counterplea. 19 H. 6.
terplea de 21. b. 22. Contra 28 E. 3. 90. b. adjudged.]
Resceipt,

pl. 1. cites 11 H. 4. 42. — Fitzh. tit. Resceipt, pl. 76. cites Mich. 9 H. 5. 10. — And by
several he shall have for *plea diverse things which tantamount that nothing in reversion, as to say,*
that the lessee after the lease released to the tenant in fee, or if a feme sole granted the reversion, and
after took baron, and then the tenant attorned, the demandant shall have this matter for plea if the
grantee offers to be received, and so to say that he who prays to be received as heir in reversion is a
bastard, or has an elder brother alive, or that he is attainted of felony, &c. — Br. Counterplea
de Resceipt, pl. 1. cites 33 H. 6. 38. — Br. Resceipt, pl. 13. cites 33 H. 6. 23. 39.

[77] [3. Nothing in reversion the day of the writ purchased is not a
Br. Ref- good plea; because he may come to the reversion created before
ceipt, pl. the writ purchased, for which he is to be received. 19 H. 6.
57. cites S. 21. b.]
C. per Al-
cough — Br. Counterplea de Resceipt, pl. 9. cites M. 10 E. 3.

[4. It is a good counterplea that he who prays to be received
has granted the reversion over to another pending the writ. 50 Aff.
3. 18 E. 3. 47. b.]

Fol. 444.

[5. The cause of the resceipt cannot be traversed generally. 8
H. 6. 16.]

Br. Coun- [6. *As, no such lease* generally, is not a good counterplea. 8
terplea de H. 6. 16. 19 H. 6. 21. b. Contra 18 E. 3. 48.]
Resceipt,

pl. 1. cites 33 H. 6. 38. by the best opinion, but it was not admitted. — In præcipe quod
reddat the tenant made default, and one prayed to be received by lease made to tenant for life, saving
the reversion, and the issue was received, that *ne lessa pas modo & forma*, and found surety of the
issues. Br. Counterplea de Resceipt, pl. 3. cites 3 H. 4. 15.

In præcipe [7. So, it is no good counterplea that the tenant had nothing of
quod red- his lease. 24 E. 3. 23. Contra. 28 E. 3. 90. b.]
dat the te-

nant made default after default, and came one J. N. and said that he himself was seised in fee, and
leased to the tenant for term of life saving the reversion, and prayed to be received, to which the
demandant said, that the prayee *ne lessa pas prist*; and the others e contra. and found for the de-
mandant by nisi prius, who demanded judgment, and the tenant prayed to replead; for he said that
the issue was misjoined; for the statute is, that he in reversion shall be received, therefore he shall
say, that nothing in reversion, and shall not say *ne lessa pas*; for he shall not traverse the cause but
the reversion; and so was the best opinion of several, but not admitted; and after, because the
prayee prayed to be received of the land and rent, because he leased for life as above, which rent
cannot pass unless by grant by deed, which he did not shew, therefore per judicium Curie, the de-
mandant recovered seisin of the rent. Br. Counterplea de Resceipt, pl. 1. cites 33 H. 6. 38. —
Br. Resceipt, pl. 13. cites 33 H. 6. 23. 39.

But Babb [8. A man may acknowledge the reversion once in a prayer,
said, they and destroy it by special matter, and it shall be a good plea. 8 H.
ought to an- 6. 16.]
swer to the
reversion,

[9. As

[9. As to say, that before the lease the prayer disseised the plaintiff, and not to and after leased to the defendant upon whom the plaintiff entered, who re-entered, so the lease destroyed, and defendant disseisor; this is a good counterplea. Dubitatur 8 H. 6. 16.]

and not to speak to the cause; Strange said, he may confess and

avoid it as here, and well; by which the demandant, to be clear, pleaded *riens in reversion*, nota; for the cause, viz. the lease for life is not traversable, but the reversion or thing which tantamounts. Br. Counterplea de Resceipt, pl. 8. cites S. C. ——— Br. Resceipt, pl. 56. cites S. C.

[10. If a man prays to be received because of a remainder limited to him, it is good counterplea, that the remainder was limited to him and his wife. 21 E. 3. 8. admitted.]

Br. Res-
ceipt, pl.
51. cites S.
C. — Br.

Counterplea de Resceipt, pl. 8. cites S. C. ——— But in formedon in remainder, the wife was received and vouched; the demandant counterpleaded the voucher to part, that she had nothing but jointly with her husband; sed non allocatur; for the default of the husband shall not make her lose her voucher or warranty; for it shall be intended that this jointenancy was made during the coverture, and then there are no moieties between them, and now by resceipt she is as a feme sole. D. 341. pl. 51. Pasch. 17 Eliz.

Counterplea that the vouchee nor his ancestors had nothing after the title of the demandant, except jointly with A. and B. who are in full life, &c. was disallowed because in a formedon; for in such case jointenancy must be expressly alleged between the vouchee himself and some of his ancestors by name with the survivors whose estate the tenant that vouches has. Besides he does not aver the continuance of the jointure during the life of the vouchee or his ancestors, &c. which is very material in a counterplea. D. 341. a. b. pl. 51.

[11. It is a good counterplea that the tenant, who is supposed to be a lessee, is seised in fee. * 21 E. 3. 13. 28 E. 3. 95. Admitted by issue 1 E. 3. 7.]

* S. P. Br.
Resceipt,
pl. 51. cites
S. C. —

* Br. Counterplea de Resceipt, pl. 6. cites S. C. but says quære of this counterplea.

[12. [So] it is a good counterplea that the tenant, who is supposed to be a lessee, is seised in tail. 39 E. 3. 8. b. admitted.]

[13. It is a good counterplea, that the tenant was seised in fee the day of the writ purchased. 27 E. 3. 87. b. admitted by issue.]

S. P. Br.
Resceipt,
pl. 63. cites

22 H. 6. 1. ——— Entry sur disseisin; the tenant made default after default, and came D. and prayed to be received; for he said, that the day of the writ purchased the tenant had nothing, but N. was seised in fee, and leased to the tenant for life pending the writ, the remainder to him who prayed in fee, and per Cur. he shall be received; by which the demandant counterpleaded, and said, that the day of the writ purchased, viz. such a day the tenant was seised in fee, and prayed that he be ousted of the Resceipt. Br. Counterplea de Resceipt, pl. 11. cites 18 E. 4. 27. ——— Br. Res-
ceipt, pl. 113. cites 18 E. 4. 27.

[14. In an action against baron and feme, if the feme prays to be received upon default of the baron, it is a good counterplea of the resceipt, that the baron pending the writ has demised the land of franktenement. 22 Aff. 13.]

Affise in
Surry, Wil-
by ousted
the feme of
resceipt, be-
cause her

baron had aliened pending the writ, at which Green murmuravit; and Brook says, it seems that it was erroneously done: for notwithstanding the alienation, the alienor remained tenant, and shall have writ of error, so she ought to be received as it seems, and the Court ought not to have taken thereof conuance. Br. Resceipt, pl. 97. cites S. C.

[15. But it is no good counterplea of the resceipt of the feme, that before the appearance of the baron and feme, they levied a fine come ceo, &c. so that the feme has no right; for her right shall be taken as it was at the time of the writ purchased, and her right is not traversable. D. 15 El. 315. 1. adjudged.]

And 18. pl.
87. ad-
judged ac-
cordingly.
Vernon v.
Stanley.—
Bendl. 198.

L. 226. Mich. 13 & 14 Eliz. S. C. and the pleadings; and adjudged the counterplea not good. ——— Dal.

—Dal. 107. pl. 59. S. C. The judges all clear of opinion that the counterplea was not good. And see there the arguments of the serjeants, and of Dye: Ch. J.

Counterplea was, that the baron and feme pending the formedon levied a fine come ceo, &c. with warranty to a stranger, &c. sed non allocat' for he is estopped by his bringing and suing his writ against them, as tenants to allege this alienation of the land by fine pending the writ. D. 341. a. b. pl. 61. Pasch. 17 Eliz.

16. *Præcipe quod reddat against baron and feme and a third, who waged their law of non-summons, and at the day the baron and the third made default; and the feme came, and said that she and her baron were tenants of the whole, and the third had nothing, and prayed to be received; and per Curiam, she shall be received; by which the demandant counterpleaded, and said that they were tenants in common the day of the writ purchased, prist; and the others e contra. Br. Counterplea de Resceipt, pl. 7. cites 21 E. 3. 13.*

17. *Entry supposed by M. the tenant made default after default, and came M. and his feme and prayed to be received, because they leased to the tenant for life saving the reversion, and the demandant said, that the tenant had nothing of the lease of the feme, et non allocatur; for this is to inveigle a jury upon lease of feme covert; by which he said, that the baron was sole seised, absque hoc, that the feme any thing had, and the others e contra. Br. Counterplea de Resceipt, pl. 10. cites 24 E. 3. 23.*

18. It is a good counterplea, where he in remainder or reversion prays to be received, to say that one mesne in remainder in tail between the tenant and him who prayed to be received had issue on J. who is in full life. Br. Counterplea de Resceipt, pl. 2. cites 41 E. 3. 13.

[79] 19. *Mortdancesfor against J. N. who vouched B. who was es-
seigned, and after de jervitio regis, and failed of his warranty at
the day, and at the same day the tenant was esseigned de servitio
regis, and at the day failed of his warranty, by which the said B.
came and prayed to be received by reversion for default of the tenant,
and it was counterpleaded because said B. upon essoign, at a former
time, made default, et non allocatur; for assise is not to be taken
by default of the vouchee, but by default of the tenant, by which he
was received by award. Br. Resceipt, pl. 22. cites 45 E. 3. 24.*

B. Count, 20. In *formedon* one came and prayed to be received, and was
pl. 85. cites received, and the demandant counted against him such like count,
S. C. *mutatis mutandis* as he counted against the tenant; quod nota.
Br. Resceipt, pl. 40. cites 5 H. 5. 13.

Br. Coun- 21. *Formedon against two; the one made default after d. fault,
terplea de and the other came and prayed to be received, inasmuch as the l. n^d
Resceipt, was given to the two, and to the heirs of the prayor; the demandant
pl. 13. cites said, that they were received in fee the day of the writ purchased,
10 H. 6. absque hoc, that they were seised to them and the heirs of the prayor,
16. — prout, &c. And admitted for a good counterplea, and the prayor
* This is was compelled to find sureties for the issues, notwithstanding that he
misprinted, and should was party to the writ; for he had not the other moiety; per Cur.
be 10 H. 6. and yet contra agreed where a feme is received in default of her
16. a. pl. 52. baron. Br. Resceipt, pl. 129. cites * 30 H. 6. 16.*

22. If

22. If baron and feme are received upon default of the tenant for life upon cause shewn, and after the baron makes default, and the feme prays to be received by his default, he cannot shew other cause. Br. Counterplea de Resceipt, pl. 1. cites 33 H. 6. 38. per Prisot.

Br. Resceipt, pl. 13. cites S. C.—So if the ancestor prays to be received for

cause, and dies, and after the heir prays to be received, he cannot shew other cause; see of this matter 41 E. 3. 12. 11 H. 4. 19. For there he shewed a new cause; for his father was within age. But at last all the justices except Danby were of opinion that the prayee may shew other cause well enough. Br. Counterplea de Resceipt, pl. 1. cites 33 H. 6. 38.—Br. Resceipt, pl. 13. cites S. C.

23. In cessavit against the baron and feme the baron made default after default, and came the feme, and said that her baron is seised in jure uxoris, and prayed to be received; the demandant counterpleaded, in as much as the baron and feme before the espousals were seised in fee which estate they continued always after; and a good counterplea, and this without shewing of whose gift; because it is pleaded in another person, and not in the tenant himself who pleaded it; and otherwise it is of jointenancy. Br. Counterplea de Resceipt, pl. 14. cites 10 E. 4. 2.

Br. Resceipt, pl. 110. cites 10 E. 4. 1. 2. S. C.

24. Formedon against A. who made two defaults, and he in remainder prayed to be received, in as much as J. N. was seised and leased to the tenant and his feme, the remainder to the prayee; the demandant said that the prayee had nothing in remainder, and was permitted to counterplead it, though the cause goes to the writ by the jointure; for he who is not received cannot plead to the writ. Br. Counterplea de Resceipt, pl. 12. cites 22 E. 4. 35.

* ((N)) [2.] Counterplea. At what Time it may be.

* See the note at ((H)) [L] supra.

[1. IF baron and feme are vouched, and the demandant grants the voucher, and after the baron makes default, and the feme prays to be received. The demandant shall not be received against his own acceptance to say that she has not any thing. 18 E. 3. 54.]

[2. But otherwise it is if the Court grants the voucher. 18 E. 3. 54.]

((O)) [R] Resceipt. In what Cases it lies after Resceipt.

[80]
* See the note at ((H)) [L] supra.

[1. IF he in reversion be received upon default of the lessee, and after makes default, and his heir comes, and says that he is dead, and prays that he be received as heir to him, yet he shall not be received. 2 E. 3. 44. adjudged.]

In error upon a judgment in a quod ei de forceat out of Wales,

one error assigned was, because the resceipt was admitted after resceipt, which ought not to be, unless in case where tenant by resceipt dies, and his heir comes in loco suo. The judgment was reversed, but it seems it was upon another error assigned. Cro. C. 262. pl. 9. Trin. 8 Car. B. R. Kiffin v. Vaughan.—See (S) for the state of the case, and (T) for the error whereupon the judgment was reversed.

2. In *formedon*, the tenant for life prayed aid of him in reversion, who came and joined, and pleaded to issue, and after made default, and *petit cape* was awarded; by which this same in reversion came, and prayed to be received, and was received: the reason seems to be, inasmuch as the first default was only the default of the tenant for life. Br. Rescript, pl. 69. cites 24 E. 3. 22.

3. If a *feme*, being tenant for life, is received upon the default of her husband, and after makes default, he in the reversion shall be received; and so note a rescript upon a rescript; and so if a baron and *feme* be received, and after the baron makes default, the *feme* shall be received. 2 Inst. 345.

(R. 2) *Pleadings.* And where Cause must be shewn before the Rescript.

1. **T**HE prayee cannot plead to the writ before he be received, as it seems; per Brooke. Br. Rescript, pl. 116.

2. He who prays to be received may say, that the tenant holds for life the reversion to him; and this is sufficient, without shewing how he has the reversion, till he be demanded by the demandant. Br. Rescript, pl. 69. cites 24 E. 3. 22.

3. In *præcipe quod reddat* the tenant made default after default, and came the baron and *feme*, and said that the tenant had nothing but for life of the lease of the *feme*, *dum sola fuit*, and prayed to be received; and it appeared to the Court that the *feme* was within age; and therefore the demandant said that this may be an affirmance of the lease; and prayed that they be not received: *et non allocatur*; but they were received; *quod nota*. Br. Rescript, pl. 68. cites 24 E. 3. 23.

[81] 4. *Scire facias* upon a fine, the tenant made default, and two barons and their *femes* prayed to be received in *jure uxorum*, and the rescript was traversed, and found surety of issues, and at the *venire facias* the prayees appeared by attorney, and the plaintiff alleged that the one baron was dead, and demanded execution of the moiety, and the *feme* was demanded, and did not come. And it was held clearly, that the warrant of attorney is expired; and after writ of the Chancery was shewed forth, rehearsing that they were received, and the baron was dead and the *feme* was sick, commanding them to receive them by attorney; and because the writ rehearsed rescript where the rescript was traversed, therefore it was held a void warrant, by which he vouched another warrant in the Chancery; and pending this in debate, the *feme* came the next day, and prayed to be received, and was received; and the opinion of the first warrant's being void was changed, and that it was good for the *feme*, as in *quare impedit* by baron and *feme*, who are by attorney, the baron died and the warrant remained. Br. Rescript, pl. 34. cites 7 H. 4. 19.

Protection does not lie for him till he be received in fact; for he

5. In *præcipe quod reddat*, a man prayed to be received for reversion by default of tenant for life, &c. The demandant counterpleaded that he had nothing in reversion, and so to issue; and at the day when the inquest appeared ready to pass, protection was cast for

for the prayee, and was disallowed, because yet he is not party; is not party
quod nota, by which the inquest was taken. Br. Rescript, pl. before. Per
118. cites 14 H. 4. 16. Boef. Br.

pl. 77. cites 37 H. 6. 2. — Br. Peremptory, pl. 53. cites S. C. Rescript,

6. In *præcipe* quod reddat the tenant made default after default, In *formacion*
and came J. N. and shewed that he had reversion, and shewed how, against a,
as he ought, and prayed to be received, and yet the cause is not and one of
traversable: contra upon aid prayer, and the reversion counterpleaded, the tenants
and so to issue, by which the prayee found surety as he ought, and and a baron
at the venire facias returned, the prayee said that the demandant had and feme
entered after the last continuance, judgment of the writ; and it was prayed to be
doubted if he shall have the plea before he be received in fact. received.
Br. Rescript, pl. 41. cites 9 H. 5. 3. The demandant said that they had nothing

in reversion, and were at issue, and after the baron made default, and the feme prayed to be received
without shewing cause; and the demandant said that she had nothing in reversion, and so to issue, and
process against the jury till they appeared; at which day the feme said that the demandant had entered
into the land after the last continuance, judgment of the writ; and upon good argument she was
ousted of the plea, and the demandant recovered seisin of the land; quod nota. And so see that
she shall not have the plea till she be received in fact. Br. Rescript, pl. 44. cites 9 H. 5. 10. &
concordat 32 H. 6. fol. 2. Contra 21 H. 6. 52.

In *præcipe* quod reddat the tenant made default after default, and came J. N. and prayed to be
received by reversion, and the demandant counterpleaded the rescript, and they were at issue, and
at the nisi prius the prayee said that the demandant had entered into the land after the last conti-
nuance, and the demandant demurred, by which the enquest was discharged, and day given in bank;
and there, by the advice of all the justices, it was awarded that the demandant shall recover seisin of
the land; for this plea does not lie in the mouth of the prayee till he be received in fact; for he is
not party before this. Br. Rescript, pl. 77. cites 37 H. 6. 2. — Br. Peremptory, pl. 53. cites
S. C. — S. P. Br. Rescript. pl. 115. cites 20 E. 4. 16. — And per Choke J. It is no plea to the
writ, nor in bar, till the issue be found for him, unless it goes to the person, as outlawry, excommunica-
tion, death, &c. but not plea, which touches the franktenement, as here. Br. Rescript, pl. 77. cites
37 H. 6. 2. — Br. Peremptory, pl. 53. cites S. C.

7. He in reversion, who prays to be received, may say that the He, who
tenements are in another vill; judgment of the writ, and issue shall prays to be
be taken upon this without new count before the rescript, inasmuch as received
the surmise is contrary to the writ. Contra of jointenancy, per may shew
Brown. Br. Rescript, pl. 62. cites 21 H. 6. 48. matter in
abatement of
the writ, as

to say that the tenements are in another vill, or that he himself leased to the tenant, and to N. who is
in full life, or misnomer, &c. and pray to be received and plead over to the action, and shall not con-
clude judgment of the writ, and this issue shall make an end of all; for if it be found for the prayee,
the writ shall abate, and if for the demandant he shall have judgment to recover. Per Prisot Ch. J.
r. Rescript, pl. 77. cites 37 H. 6. 2. — Br. Peremptory, pl. 53. cites S. C.

8. A feme, who prays to be received, may have, before the res-
cript, and upon the rescript, diverse pleas; as to say, that the baron
had nothing but in her right, and plead misnomer of herself or of her
baron, or that the tenements are in another vill, or that the demandant
is made a knight, earl, or duke, pending the writ. Br. Rescript,
pl. 62. cites 21 H. 6. 48. Per Newton.

9. In assise, albeit that one who is party to the assise, prays to be
received, he shall not plead before the rescript granted. So of a feme
covert. Br. Rescript, pl. 62. cites 21 H. 6. 48. Per Newton.

10. And in *præcipe* quod reddat, 18 E. 3. against baron and
feme, who made default after default, and he in reversion prayed to
be received, and said that the baron was dead, judgment of the writ: [82]
and

and it was awarded that he shall be first received, and after shall plead; for he cannot be received and abate the writ, and all at one time. Ibid.

11. The writ of resceipt ought to make mention that the tenant holds for term of life, the reversion to him who prays, &c. For otherwise he shall not be received. Br. Resceipt, pl. 63. cites 22 H. 6. 1.

12. If two femes as femes of the baron pray to be received, there it shall be tried which of them is his feme, before any resceipt shall be granted. Per Littleton. Br. Resceipt, pl. 107. cites 2 E. 4. 16.

13. Cessavit against the baron and feme of 6 acres held by 8s. and after the baron made default, by which petit cape issued, and he made default, and the feme prayed to be received, and as to one acre said, that she held it by fealty and 2d. and that it was open and sufficient to his distress; and as to another acre, such like plea; and to the rest said, that she held of him as above, absque hoc, that she held the 6 acres modo & forma. And so see that she pleaded immediately in her prayer to be received. Br. Resceipt, pl. 110. cites 10 E. 4. 1. 2.

(R 3) Pleadings. Profert or Monstrans of Deeds, &c. Necessary in what Cases.

1. **I**N assise against several, the one named in the writ, scil. C. was received in default of another; and when he and the demandant were at issue upon counterplea of the resceipt, C. scil. the prayor, was received to make attorney by writ, & concordat. P. 15 & 13. & H. 12. And the prayee to be received pleaded a writ of a higher nature brought by the demandant against the tenant for life, and did not shew the record, and yet a good plea in bar of assise, and lies well in his mouth; for he has the reversion; nota. Br. Resceipt, pl. 90. cites 16 Aff. 17.

Br. Mon-
strans, pl.
46. cites S.
C.

2. *Præcipe quod reddat* against 2 barons and their femes, the one baron and feme made default after default, and the other baron appeared in person and his feme by attorney, and he said, that the land was given to them and to the heirs of this baron who prayed, by which he prayed to be received; and upon this matter he is receivable without shewing specialty of the gift. Contra upon grant of the reversion, but here is gift in possession; by which the demandant counterpleaded, inasmuch as it was given to them and to them all, and to the heirs of the body of this baron and his feme; and because the feme did not come, judgment if he shall be received; and the other said, that the gift was to the 4th, and to the heirs of his body only; and so to issue: and the baron who prayed was compelled to find surety for the mesne issues, notwithstanding that he is party to the writ; for he is not receivable but of the moiety, and of the other moiety he shall answer immediately. Br. Resceipt, pl. 51. cites 21 E. 3. 8.

3. *Scire facias* upon a fine, the tenant in tail after possibility of issue extinct made default after issue joined, and he in remainder prayed to be received, and was received; and yet the remainder was

to. the, and the one released to the other, pending the writ; and yet this alone was received, but he shall shew the deeds of remainder and of release. Br. Resceipt, pl. 30. cites 7 H. 4. 10.

4. In *præcipe quod reddat* the tenant made default after default, and came J. N. and prayed to be received, because W. was seised in fee, and leased to the tenant for life, the remainder to the prayer in fee: and the best opinion was, that he shall be received without shewing deed of the remainder; for he is to affirm the possession, and is by way of defence * to defend the title of the tenant, and therefore may be received without deed. Contra where he is to recover the land by way of action, as in formedon in remainder, action of waste, &c. But P. 22 H. 6. fo. 1. The tenant for term of life shall have aid of him in remainder without shewing deed, and therefore a fortiori here; for the deed belongs to the tenant for life during his life. Br. Resceipt, pl. 15. cites 35 H. 6. 31.

*[83]
In *præcipe*
quod reddat
against R.
who made
default af-
ter default,
and came
N. and said,
that J. N.
was seised in
fee, and
leased to the
tenant and
his feme, and
prayed to be

received, and the demandant was permitted to counterplead the resceipt; and said, that the prayer had nothing in remainder, though the cause of the resceipt goes in abatement of the writ by jointenancy in the tenant and his feme. And per Catesby J. He in the remainder shall be received without shewing deed of the remainder; for this belongs to the tenant for life during his life, and the remainder may pass by livery without deed. Br. Resceipt, pl. 116. cites 23 E. 4. 35. — Br. Maintenance de Brief, pl. 37. cites S. C.

(R. 4) Pleadings. Traverse necessary; and Good or not.

1. **I**N *præcipe quod reddat* one came in default of the tenant, and prayed to be received by reversion to him descended, and prayed that the parol demur for his age; and the demandant would have traversed that the ancestor had nothing of the feoffment of A. &c. and yet was compelled to say, that nothing in reversion, &c. Br. Resceipt, pl. 20. cites 44 E. 3. 6.

Cessavit
against 3
who made
default after
default, and
at the grand
cape waged
their law of
nonsum-

mons; and at the day 2 came and the 3d made default, and therefore came J. N. and prayed to be received of the 3d part, because he leased to the 3 for life, the reversion in him; and the demandant traversed the lease, but at last he traversed the reversion, that nothing in reversion the day of the writ purchased, and the issue taken accordingly; and he found surety of the issues. And this seems to be only of the 3d part of which he is received; and the other 2 waged their law for the 2 parts, and the writ abated for the 2 parts and stood for the rest. Br. Resceipt, pl. 23. cites 48 E. 3. 13.

2. He in remainder for life shall be received by default of the tenant for life, and if he makes default after, yet another in remainder may be received though he did not offer himself at the day when the first in remainder was received; for he had no time till now, and he came before judgment; and because the cause was sufficient without deed, therefore the demandant traversed the cause, and said, that T. did not lease for term of life, the remainder over, prout, &c. and the issue was accepted, and yet it was doubted if it was negative pregnant; for it seems that the best issue had been, that he did not lease modo & forma, prout, &c. and this goes to all; and where the statute is, that the tenant by resceipt shall be paratus petenti respondere, yet where a man tenders and prays to be received in one term, and this pends in advisement if he shall be re-

ceived or not till another term, and there is received, this suffices, though he did not plead before: for he cannot plead till he be received in fact; quod nota. Per tot. Cur. Br. Resceipt, pl. 63. cites 22 H. 6. 1.

And also here the reversion ought to have been traversed and not the lease. Ibid. — And he who prays to be received ought to shew cause, and if the cause be not sufficient the demandant may demur, and yet he shall not traverse the cause, as a man may demur for a thing formal, as the year and day in trespass, &c. and yet they are not traversable. Ibid.

† [84]

* Viz. a reversion or remainder newly created, and not in esse before.

3. In *præcipe quod reddat* the tenant made default after default, and came T. and prayed to be received because he was seised and leased to the tenant for life, saving the reversion, and that the tenant held for life, the reversion to him, and prayed to be received; and the demandant traversed the lease, and it was found for him, and he prayed judgment; and the best opinion was, that he shall not have judgment; for the prayee ought to have said farther, that the reversion was in him the day of the writ purchased; for plea dilatory shall be good to every common intent. And if it shall be taken good to one intent, and to another contra, then it shall be taken the most strong against him who pleads it, scil. that the tenant † pending the writ demised to the prayor in fee, and he leased again to the tenant for life, this is no cause of resceipt. Br. Resceipt, pl. 133. cites 32 H. 6. 12.

and yet he shall not traverse the cause, as a man may demur for a thing formal, as the year and day in trespass, &c. and yet they are not traversable. Ibid.

4. The demandant in writ of entry *sur disseisin* traversed, that he in remainder had nothing in remainder the day of the writ purchased, et non allocatur; for if he purchase the remainder pending the writ he shall be received, but if remainder or reversion be * made pending the writ a man shall not be received by this. Br. Resceipt, pl. 136. cites 16 H. 7. 5.

(R. 5) Proceedings after Resceipt.

And after Caund. said, that T. in the mesne remainder had issue one J. in full life, and the other was compelled to answer to it; who said, that no such J. in reum natura. Ibid.

1. **I**N *præcipe quod reddat* the tenant made default after default, and came E. and said, that J. D. was seised and gave to the tenant and her baron in tail, the remainder to T. in tail, the remainder to the heirs of T. and that the baron is dead without issue, and T. is dead without issue, and he is right heir, to him scil. brother, &c. and prayed to be received, and for his nonage that the parol demur; and the demandant said, that he had nothing in remainder, and had day over; and at the day E. did not come, but one S. came, and said, that fine was levied by which Richard acknowledged the right to Robert, &c. and Robert rendered to Richard for life, the remainder to the tenant and her baron in tail, the remainder to T. in tail, the reversion to him and his heirs, and that the baron died without issue, and that T. died without issue, and E. is dead, and he as heir to him prayed to be received. And the opinion of the Court was, that by reason that E. was an infant he might have changed his plea, and by consequence so may S. who is heir to him; and therefore he shall be received upon this new cause. But by 11 H. 4. 19. he shall not change his cause if he was of full age. Br. Resceipt, pl. 18. cites 41 E. 3. 12.

2. Upon resceipt there shall be new plea, new issue, and new process,

process, and the prayee cannot sever in answer. Br. Resceipt, pl. 34. cites 7 H. 4. 19.

3. The prayee, or a feme covert, or the heir, may shew a new cause, and other cause after a former prayer to be received, and so may change his cause. Br. Resceipt, pl. 13. cites 33 H. 6. 23, 39. by all the justices except Danby. Sec pl. 1.

4. In *præcipe quod reddat* 3 were received upon default of the tenant and joined issue, and *venire facias* issued and was returned; and then it was shewn, That one of the 3 was dead: and by advice of all the justices it was awarded, That the issue shall stand and the surety also, and *venire facias de novo* issued; quod nota: and the surety which was put in before by those in reversion came a latere and stood also, notwithstanding the death of the one after. Br. Resceipt, pl. 114. cites 19 E. 4. 4.

* See the note at ((H)) [L] supra. [85]

* ((P)) [S] Pleas after Resceipt.

[1. THE words of the statute are, *parata petenti respondere*.] 13 E. 1. cap. 3.

[2. If a feme be received upon default of the baron she cannot *imparle*, but she ought to answer. 25 Aff. 14. But quære.] Br. Resceipt, pl. 100. cites

S. C.——D. 298. b. pl. 28. in Vernon's case, cites S. C.——It was held, That tenant by resceipt cannot *imparle*; for the statute is, That he shall be *paratus petenti respondere*. Br. Resceipt, pl. 62. cites Trin. 11 E. 3.——S. P. Theloall's Dig. Lib. 18. cap. 11. pl. 35. cites 21 H. 6. 52.

[3. If a feme be received upon default of the baron she may vouch. * 20 H. 6. 23. b. 25 Aff. 14.]

Fol. 445.

* Br. Resceipt, pl. 10. cites S. C.——In *assise* against the baron and feme, the baron made default and the feme appeared, and she prayed to be received, and was received, and vouched to warranty her own baron as assignee, and shewed deed; and he entered into the warranty, and pleaded in bar, and it was accepted. Br. Resceipt, pl. 81. cites 8 Aff. 33.

In *assise of mort d'ancestor* against baron and feme the baron made default, and the feme was received and vouched to warranty; and so see here in this *assise* of mort d'ancestor, that tenant by receipt may vouch. Br. Resceipt, pl. 82. cites 8 Aff. 36.——S. P. 2 Inst. 344.

Where a formedon in remainder had depended 5 years, and the femes upon default of their barons prayed resceipt and vouched, it was at length held by the Court to be the sure way, and without error, to grant the voucher. D. 298. pl. 28. Hill. 13 Eliz. Vernon's case.——Dal. 107. pl. 59.——The feme being received may pray in aid or vouch; and so she has been received where she has not been *parata respondere*. But the ancient fathers of the law considering the statute of Westm. 2. cap. 3. perceived that if the statute be taken strictly and literally a great inconvenience would ensue, viz. The loss of the recompence by the warranty, &c. and therefore took the statute by equity and according to reason, though seemingly contrary to the words, Arg. Pl. C. 13. b. in the case of Reniger v. Fogossa.

[4. The same law if he in remainder be received. 24 E. 3. 32.]

[5. So she may pray in aid, where she cannot vouch, to deraign the warranty paramount. 20 H. 6. 23.] Theloall's Dig. Lib. 13 cap. 11.

pl. 32. cites S. C.——Br. Resceipt, pl. 10. cites S. C.——Tenant by resceipt shall have aid, and may vouch, notwithstanding the statute says that he shall be *paratus respondere*. Br. Resceipt, pl. 73. cites 24 E. 3. 32.

[6. So he in remainder for life being received, shall have aid of him in remainder in fee. 24 E. 3. 32. Adjudged.]

H 2

[7. So

* Br. Re-
script, pl.
10. cites
S. C. That

[7. So she may pray in aid, though she might vouch, as she shall have aid of him in reversion, and shall not be compelled to vouch. * 20 H. 6. 23. b. 40 Aff. 20. Adjudged. 12 R. 2. Ayd. 123.]
the feme was received, and shewed that J. N. leased to them for life, and prayed aid of him, and had the aid after argument, per judicium, notwithstanding the statute says, That she shall be received parata petenti respondere.

In attain, the baron and feme tenants for term of life prayed aid of him in the reversion, and had it, and at the day of summons in auxilium returned, the baron made default, and the prayee also, and the feme prayed to be received, and was received, and prayed aid again, and had it. Br. Rescript, pl. 102. cites 40 Aff. 20.

In dower against J. R. and M. his feme, they were at issue, and at the nisi prius the baron made default, and recorded it at the day in bank, OEtav. Mich. and at the same day the feme was received by writ of the king by attorney, because she was grossly essent, and said that T. was seised in fee, and leased to her for life, the remainder to W. N. in fee, and prayed aid of him, and had aid by award, without shewing deed of remainder for all is good by delivery without deed. Br. Rescript, pl. 63. cites 22 H. 6. 1.

But in assise
of darrein
presentment

[8. If a feme after partition be received upon default of the baron, she shall have aid of the other coparcener. 20 H. 6. 23. b.]

against baron and feme, the feme was received by default of the baron, notwithstanding that advowson is not properly land or tenement, and said, That she held the advowson with A. her sister in coparcenary, and shewed how, which A. is in full life, not named, judgment of the writ, and was ousted of the plea; quære causam, because it seems that a man may vouch in this action, as in assise of mortdancestor; § but it was said there, quod non, peradventure unless he who is named in the writ. Br. Rescript, pl. 62. cites Trin. 11 E. 3. — Theloall's Dig. Lib. 13. cap. 11. pl. 12. cites 11 E. 3. Rescript, 115. S. C.

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S. P. Br.
Rescript,
pl. 20. cites
44 E. 3. 6.
and Brooke
says, and so

[9. If he in reversion or remainder being within age, and in by descent, be received upon default of the lessee, yet he may pray the parol to demur for his nonage, and shall have his age. 18 E. 3. 33. 24 E. 3. 32. b. Contra 7 E. 3. D. 13 El. 298. 28.]

see, That he prayed his age notwithstanding the statute says, That he shall be paratus petenti respondere. — So of a feme covert; for those words of the act are to be understood, when she ought to plead by law, then she shall be ready to plead. 2 Inst. 344.

[10. So he in reversion being received may pray the parol to demur for the non-age of the demandant. 2 E. 3. 63. Adjudged.]

[11. If he in remainder for life be received upon default of the lessee for life, he may pray in aid of him in remainder in fee, and that the parol may demur for their non-age. 24 E. 3. 32. b.]

* Vernon's
case. —

† The feme
vouched to
warranty,
and after

[12. In a formedon against baron and feme, the feme being received upon default of the baron, may vouch another to warranty. D. 13 El. * 298. 28. per Curiam. D. 1. 2. Ma. † 103. 8. 17 El. † 341. 51.]

she waived the voucher, and joined the mise upon the grand assise. Ibid. — † Bendl. 206. pl. 241. S. C. with the pleadings and counterplea, but no judgment mentioned; but refers to Dyer as above, and to the New Book of Entries, fol. 334. 338, and 340. for the pleadings at large.

Sotenant by
rescript a
latere, after
he is re-
ceived may

13. Feme received shall plead the death of her baron. Theloall's Dig. Lib. 13. cap. 11. pl. 5. cites Pasch. 5 E. 2. Rescript, 164. 18 E. 3. 38. & Mich. 17 E. 3. 61. Quære.

plead the death of the tenant, but not before. Theloall's Dig. Lib. 13. cap. 11. pl. 18. cites Pasch. 18 E. 3. 11. Rescript, 109. — And that he was dead before the writ purchased. Ibid. cites H. 26 E. 3. 57. — But feme received shall not plead that her baron was dead the day of the writ purchased. Ibid. pl. 5. cites 3 H. 6. 20.

In dower against several, judgment was given against some of them by their default, and one prayed to be received upon the default of the others, before judgment given against them, and said, *that*

that some of them against whom judgment was given, were dead, &c. upon which he was received; but he was ousted of this plea, and put to plead in bar. Theloall's Dig. Lib. 13. cap. 11. pl. 19. cites Trin. 19 E. 3. Rescript, 14.——Ibid. pl. 25. cites Mich. 48 E. 3. 25. says, That he shall plead that one of the tenants is dead.

14. A feme received may falsify the entry. Theloall's Dig. Lib. 13. cap. 11. pl. 2. cites 3 E. 3. It. North. Entre, 6. *But feme received was not received to falsify the entry in cui in vita.* Theloall's Dig. Lib. 13. cap. 11. pl. 22. cites Pasch. 31 E. 3. Rescript, 126. and 42 Aff. 4.

15. Tenant by rescript a latere was received to plead to the writ for repugnancy apparent in the writ, and it was abated. Theloall's Dig. Lib. 13. cap. 11. pl. 2. cites Mich. 3 E. 3. 97.

16. A feme received shall not plead *non-tenure* in abatement of the writ; per opinionem. Theloall's Dig. Lib. 13. cap. 11. pl. 4. cites 6 E. 3. 242. and 3 H. 6. 20. *But in assise of rent-charge the feme received was received to plead non-tenure.* Theloall's Dig. Lib. 13. cap. 11. pl. 6. cites Mich. 17 E. 2. Rescript, 173.

17. A feme received shall not plead *jointenancy* for the non-tenure; per opinionem. Theloall's Dig. Lib. 13. cap. 11. pl. 4. cites H. 6. E. 3. 242. and 3 H. 6. 20. *Ibid, says, that it is adjudged contra Mich. 10 E. 3. 533.*

17 E. 3. 41. agreed, and 31 E. 3. Rescript, 126. and * 42 Aff. 4. But he who comes a latere shall not plead jointenancy. Ibidem.——* Br. Rescript, pl. 104. cites S. C. per Persey; quod non negatur.——S. P. per Newton. Br. Rescript, pl. 62. cites 21 H. 6. 48.——S. P. Theloall's Dig. Lib. 13. cap. 11. pl. 35. cites 21 H. 6. 52. S. C.

18. In cessavit against baron and feme who pleaded open, and sufficient to his distress, and after the baron made default at the petit cape, and the feme shewed cause, and prayed to be received, inasmuch as she held for the term of her life of the lease of A. and notwithstanding the contrariety she was received, and after pleaded the same plea to the writ, and the demandant maintained that they held of him as the writ supposed. Br. Rescript, pl. 62. cites Trin. 8 E. 3. [87]

19. It seems by the opinion of T. 4 E. 3. 148. That the feme received may say, That the demandant has entered and disseised her pending the writ, notwithstanding that she be not now tenant; for she was tenant the day of the writ purchased. Theloall's Dig. Lib. 13. cap. 11. pl. 3. cites 8 E. 3. 420. Theloall's Dig. Lib. 13. cap. 11. pl. 8. cites Trin. 8 E. 3. 407. S. C.

20. Tenant by receipt a latere in dower cannot say, That the demandant detains charters concerning, &c. Theloall's Dig. Lib. 13. cap. 11. pl. 9. cites M. 8. E. 3. 422.

21. Feme received shall plead *misnosmer* of herself in her name of baptism. Theloall's Dig. Lib. 13. cap. 11. pl. 10. cites M. 10 E. 3. 536. S. P. Ibid. pl. 38. cites P. 41 F. 9. Saver Def. 25.—And

she was received with saying, That she is the same person. Ibid. pl. 10. cites 25 E. 3. 44.——So she may plead *misnosmer* of her baron. Ibid. pl. 35. cites T. 21 H. 6. 52.——Tenant by receipt shall plead *misnosmer* of the tenant in name of baptism with averment, that he is the same person. Theloall's Dig. Lib. 13. cap. 11. pl. 11. cites M. 10 E. 3. 537.——A feme received may peradventure plead *misnosmer* of the demandant. Per Newton. Br. Rescript, pl. 62. cites 21 H. 6. 48.

22. Tenant by resceipt a latere in writ of entry in the post may plead *to the writ, that the demandant might have writ within the degrees.* Theloall's Dig. Lib. 13. cap. 11. pl. 11. cites M. 10 E. 3. 537.

23. In writ of entry supposing the entry by two, the tenant by resceipt a latere cannot say that the tenant entered by one alone. Theloall's Dig. Lib. 13. cap. 11. pl. 13. cites M. 11 E. 3. Resceipt, 119.

24. In *assise against C. P. and two others, who pleaded to the assise by bailiff, and the assise remained, and at another day came C. and as tenant was received to plead by release with warranty of the ancestor of the plaintiff; for of this lies, certificate and this shall avoid circuitry of action, the plaintiff said that C. had nothing, but R. is tenant, and the others e contra; and at this day all made default but C. and she said, That R. is tenant of the franktenement, the reversion to her, and by his default prayed to be received, and was received, because the plaintiff refused her for tenant before, and upon this both are now agreed, by which she pleaded now another plea in bar, and well; for this is a new tenancy, therefore shall have new answer.* Br. Resceipt, pl. 83. cites 11 Ass. 3.

25. Feme received shall plead, *That the demandant demands the land and rent issuing out of the same land.* Theloall's Dig. Lib. 13. cap. 11. pl. 15. cites M. 12 E. 3. Brief, 257.

26. Feme received shall plead *outlawry in the demandant, if she be received before appearance or admittance of her baron before.* Theloall's Dig. Lib. 13. cap. 11. pl. 15. cites 13 E. 3. Utlary, 9. 49. And says, *Quære if she may do so after.*

27. Tenant by resceipt in assise may say, *That the plaintiff has another writ pending of a higher nature against the tenant, &c.* Theloall's Dig. Lib. 13. cap. 11. pl. 16. cites M. 16 E. 3. Resceipt, 103. 16 Ass. 17.

S. P. Per Brown, So that if the 1st declaration be ill,

28. Against tenant by resceipt the demandant shall count *de novo*, and so he did; quod nota. Br. Resceipt, pl. 93. cites 21 Ass. 17.

and the last good, no advantage shall be taken of the first declaration; *for by resceipt the first matter is waived to the original, as it seems.* Br. Resceipt, pl. 62. cites 21 H. 6. 48.

S. P. And to this new count *may the prayee vouch and plead in bar, and no declaration shall be made but where the demandant has not declared till the resceipt; contra where he has declared before the resceipt.* Br. Resceipt, pl. 14. cites 33 H. 6. 53.

In *formedon against baron and feme, the demandant counted, and did not allege esplees in the donee, and the baron made default, and petit cape issued, and at the day the baron made default also, by which the feme prayed to be received; and upon her resceipt she pleaded to the count, because no esplees are alleged in the donee; and per Cur. she shall not plead in bar before that she be received in fact.* by which *Palton* suffered the resceipt, and then she pleaded to the count, as before; and the best opinion there was, That this is new tenancy given by the statute, and new tenancy shall have new count, and therefore the demandant counted *de novo*. Br. Resceipt, pl. 5. cites 3 H. 6. 41. And so he did. Mich. 4 H. 6. as it is said there.——So against the voucher. Br. Resceipt, pl. 5. cites 3 H. 6. 41.

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29. A feme received said, *That one of the vills is a hamlet of the other, &c.* Adjudged a good plea without the pleading upon the resceipt. Theloall's Dig. Lib. 13. cap. 11. pl. 21. cites M. 22 E. 3. 14. Contra M. 10 H. 4. 2.

30. *Assise*

30. *Assise against baron and feme who pleaded record, and failed of it at the day, and the feme came and prayed to be received, and was received, quod nota; by which she pleaded nul tort to the assise.* Br. Resceipt, pl. 101. cites 26 Aff. 35.

31. *In cui in vita against baron and feme, supposing the entry by the baron of the demandant, the baron made default, and the feme was received, and said that the baron found him seised; judgment of the writ, and was ousted of the plea; for she is not in mischief of warranty.* Br. Resceipt, pl. 62. cites 31 E. 3.
S. P. But she shall plead jointenancy and falsify the entry in writ within the degrees, to have her warranty. Theloall's Dig. Lib. 13. cap. 11. pl. 17. cites T. 17 E. 3. 40. 10 E. 3. 31 E. 3.

32. *A feme received shall not plead misnosmer of the vill.* Theloall's Dig. Lib. 13. cap. 11. pl. 35. cites Misnosmer, 12.
But Ibid. pl. 22. cites 31 E. 3.
Resceipt, 126. and 42 Aff. 4. says, That she shall plead misnosmer of the vill.—S. P. Per Percy, quod non negatur. Br. Resceipt, pl. 104. cites 42 Aff. 4.

33. *In waste against baron and feme, writ of enquiry of waste was awarded by their default, and the waste found for the plaintiff, and at the day in bank the feme was received, and pleaded no waste done.* Br. Resceipt, pl. 63. cites P. 7. & H. 32 E. 3.

34. *Præcipe quod reddat against baron and feme, who made default after default, and came N. and said that he himself was seised and leased to the baron and feme, and to one J. S. who is in full life not named in the writ, and prayed to be received; and the demandant upon this matter was compelled to maintain his writ. And so see plea to the writ upon the resceipt, and if the demandant had admitted his resceipt his writ had abated, by which he said that the baron and feme are tenants, and the others e contra.* Br. Resceipt, pl. 16. cites 40 E. 3. 12.
S. P. & Infla. 345.

35. *Scire facias against baron and feme, who made default at the nisi prius, and the feme was received at the day of petit cape, and pleaded to the writ, that the plaintiff had a coheir in full life, and admitted; quod nota.* Br. Resceipt, pl. 19. cites 42 E. 3. 2.

36. *Assise against baron and feme of tenements in Gloucester, the baron made default, and the feme prayed to be received; and said upon her resceipt, and before that she was received in fact, that the tenements are in the suburbs of Gloucester, and not in Gloucester; and the plaintiff was put to answer to the exception by award. Hunter said the feme ought to plead in bar, and defend her right; for so is the statute: et non allocatur.* Br. Resceipt, pl. 104. cites 42 Aff. 4.
Theloall's Dig. Lib. 13. cap. 12. pl. 33. cites 42 Aff. 4. And says, Quære of him who comes a latere. H. 18 E. 3. 4.—

Feme received, shall not plead that the tenements are in another vill. Theloall's Dig. Lib. 13. cap. 11. pl. 35. cites 19 E. 2. Resceipt, 177. 178.—But Percy said, That she shall plead that the tenements are in another vill; quod non negatur. Br. Resceipt, pl. 104. cites 42 Aff. 4.

37. *In writ of entry, supposing that the baron and feme had not entry, unless by such a one, there the feme received cannot say that she was seised before the coverture, &c. because there is no mischief of warranty.* Theloall's Dig. Lib. 13. cap. 11. pl. 24. cites T. 45 E. 3. 17.

A thing which is in mischief of warranty, and which proves the

38. Note, that *tenant by rescript may plead to the writ a thing which goes in mischief of his warrant, &c.* as to falsify the entry in writ of dum * fuit infra ætatem, and in the per, &c. Br. Rescript, pl. 21. cites 45 E. 3. 25.

writ abated in law, the feme may have; as to say that the original was brought by two, and the one is dead pending the writ. Br. Rescript, pl. 62. cites 21 H. 6. 48. Per Paston.—*She may plead all manner of pleas, and take all other advantages which she and her husband might have done, and especially such pleas as trench to the mischief of the warranty.* 2 Inst. 344.
Tenant by rescript may have plea which is contrariant; for if she was tenant per autre vie, she may say cesty que vie is dead pending the writ. Per Prisot. Br. Rescript, pl. 62. cites 21 H. 6. 48.—*Theloall's Dig. Lib. 13. cap. 11. pl. 35. cites 21 H. 6. 52. S. C.*

Brooke says, It seems that in the principal case the tenant by rescript shall not have the plea; for it is contrary

39. In *præcipe quod reddat*, the tenant demanded the view, and after had day by *prece partium*, and after made default, and then came *W.* and prayed to be received for reversion, and was received, and after pleaded that the tenants had nothing the day of the writ purchased, judgment of the writ; and it seems that he shall not have the plea, for the tenant has affirmed the writ by his appearance and continuance by *prece partium*, and so the tenant by receipt shall not contradict it. Br. Rescript, pl. 24. cites 48 E. 3. 25.

to his rescript. Ibid.—*Theloall's Dig. Lib. 13. cap. 11. pl. 25. cites S. C.*—*In writ against baron and feme, the tenant by rescript upon the rescript said that the feme had nothing, and that the baron held for term of his life of his lease, &c. and prayed to be received, and was received, and pleaded to the action; for the writ shall not abate.* Theloall's Dig. Lib. 13. cap. 11. pl. 29. cites M. 13 R. 2. Rescript, 98.

So if feme be received in default of her baron in writ of aiel, she

40. And per Hanmer, in *præcipe quod reddat* by a feme, if the tenant make default, and he in reversion is received, he shall plead that the feme demandant took baron pending the writ; quod Perley concessit. Br. Rescript, pl. 24. cites 48 E. 3. 25.

may plead the like plea. Per Newton. Br. Rescript, pl. 62. cites 21 H. 6. 48.—*Theloall's Dig. Lib. 13. cap. 11. pl. 35. cites 21 H. 6. 52. S. C.*—*Tenant by rescript may say that the demandant is a feme covert, notwithstanding that the tenant has accepted the writ good.* Theloall's Dig. Lib. 13. cap. 11. pl. 26. cites M. 48 E. 3. 25.

41. In *formedon in London* against baron and feme, the feme received was at issue with the demandant upon a foreign plea, and the record removed into C. B. for the trial, &c. and the feme pleaded there, that after the removal the demandant had recovered against her baron and her, &c. and so their tenancy lost, &c. judgment of the writ, &c. And it was held that she shall not have the plea, unless the recovery was after the last continuance, and also that she shall not have the plea in this place, which has only power to try the issue, &c. Theloall's Dig. Lib. 13. cap. 11. pl. 26. cites 49 E. 3. 21.

42. Tenant by receipt in dower shall plead in abatement of the writ, that the demandant has accepted parcel of the tenements in the same vill in the name of dower, &c. But it was said that it was a plea to the action. Theloall's Dig. Lib. 13. cap. 11. pl. 27. cites P. 7. R. 2. Rescript, 95.

43. It was said that tenant by receipt shall plead *darrein seisin* in writ of aiel. Theloall's Dig. Lib. 13. cap. 11. pl. 27. cites P. 7. R. 2. Rescript, 95.

44. In *scire facias* against baron and feme the baron made default, and the feme was received by attorney by writ of Chancery, which testified that she was sick, and pleaded recovery by a stranger by cigne title upon nient dedire, who had sued execution; judgment of the writ, and no plea, because it is not by action tried. Br. Rescript, pl. 31. cites 7 H. 4. 15.

Br. Brief, pl. 108. cites S. C.—A feme received in scire facias was ousted from abating the writ

by pleading of a recovery and execution sued by a stranger against her baron and her in a formodon by nient dedire pending the scire facias, &c. because by the prayer to be received, she has affirmed herself to be tenant. Quære. Theloall's Dig. Lib. 13. cap. 11. pl. 30. cites M. 4. H. 4. 1.

45. The tenant by rescript, upon his rescript may say that the demandant is his villein. Per Cottismore; quære inde. Br. Rescript, pl. 44. cites 9 H. 5. fol. ultimo in the written book.

46. The rescript was counterpleaded, and upon this at issue, and after the prayee pleaded an entry of the demandant after the last continuance, &c. And it was held that he shall have the plea; quære. Theloall's Dig. Lib. 13. cap. 11. pl. 31. cites P. 9 H. 5. 3. Contra 37 H. 6. 2. Per judicium, and 20 E. 4. 9. But he shall have the plea after that he is received.

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47. Writ of entry sur disseisin against baron and feme, who made default after default, and came the feme, and prayed to be received, and was received, and said that the baron and she did not disseise, &c. And it was doubted by Godred, if she shall answer to the disseisin of her baron, or of herself only; quære; for it was not adjudged. Br. Rescript, pl. 7. cites 9 H. 6. 26.

But in formodon and cat in vita, the feme shall answer to all that is done per. Per Babb. plea. Ibid.

And the best opinion was that she shall have the

48. *Præcipe quod reddat* in M. against baron and feme, who after essoign made default, and came he in remainder, and said that J. N. was seised, and leased to them for life, the remainder to him, and prayed to be received, and upon his rescript said that there are two M's in the same county, viz. Over-M. and Nether-M. absque hoc, that there is M. only, and demanded judgment of the writ, &c. Sed non ulterius arguitur; but Port. said, That in this case he in remainder ought to shew deed upon his rescript, & Markham noluit; quære, & vide 35 H. 6. inde. Br. Rescript, pl. 9. cites 20 H. 6. 20.

Theloall's Dig. Lib. 13. cap. 11. pl. 34. cites 20 H. 6. 22. 46. and adds quære.

49. Writ of aiel against baron and feme, and at the nisi prius the baron and feme made default, by which petit cape was awarded returnable at another day; and the feme upon cause shewn, prayed to be received, and said by Portington, That the demandant had entered into the land pending the writ, judgment of the writ, and did not say that he has entered after the last continuance, and yet well; for she is now as a new tenant, but he who is party to the writ, and not as tenant by rescript, may have this plea without saving the default; contra of the baron and feme together, or other tenant, who has made default; and it is not in case of rescript; for plea which proves the writ abated, and which trenches in mischief, of warranty, the prayee to be received may have in form as above. And after Markham demurred upon the rescript, by which the tenant by rescript made attorney,

Theloall's Dig. Lib. 13. cap. 11. pl. 35. cites T. 21 H. 6. 52. S. C.

attorney, and by several she shall have the plea above; for *this is a last seisin, which is a good bar in writ of aiel, though the prayer conclude to the writ*; and per Arden, The feme shall have the plea; for otherwise she shall be charged of the issues and profits from the death of the ancestor till the judgment given, where the demandant himself is seised, by which the demandant said, That he entered pending the writ. Br. Rescript, pl. 62. cites 21 H. 6. 48.

Theloall's
Dig. Lib.
13. cap. 11.
pl. 35. cites
21 H. 6. 52.
S. C.

50. Tenant by rescript after the rescript shall be admitted to *abate the writ by false Latin*. Per Portington. Br. Rescript, pl. 62. cites 21 H. 6. 48.

51. Feme received may plead, *That the demandant is made a knight, &c.* Theloall's Dig. Lib. 13. cap. 11. pl. 35. cites T. 21 H. 6. 52.

52. *Tenant by rescript, who is received, and traverses the action, and after makes default at the nisi prius, cannot at the day in bank save his default by pretence of floods or by any other way; for immediately by default he is out of court.* Br. Rescript, pl. 120. cites 22 H. 6. 15.

53. In *præcipe quod reddat against tenant for life of land in A. B. and C. and the tenant rendered the action, and came he in remainder, and prayed to be received, and shewed cause, and said, That all the land lay in A. and B. and none in C. Judgment of the writ; and by some this is a good plea upon the rescript for the mischief of the warranty; for the demandant did not demur, but took issue that it lay in A. B. and C. therefore quære if it be necessary; and per Choke and Moile, the tenant by rescript shall not say, That the tenements are in another in vill; for there he is not at mischief: and after Littleton pleaded for the tenant by the rescript and upon the rescript, that 3 acres parcel of the land in demand are * ancient demesne, and shewed certainly, &c. and a good plea, notwithstanding that the tenant had affirmed it to be frankfee, and so the jurisdiction once affirmed; and to another acre [that it was] not [ancient demesne] quod nota, but he shall plead this after the rescript, per opinionem, &c.* Br. Rescript, pl. 108. cites 2 E. 4. 25.

[91]

* But the
vouchee
shall not
plead this
plea; for
he is not at
mischief;
for he has
departed

with the land with warranty. Ibid.—But the prayer is to have the land after the death of the tenant for life; and it is mischievous to him to have the nature of the land changed. Ibid.—Theloall's Dig. Lib. 13. cap. 11. pl. 36. cites 2 E. 4. 29. S. C.

54. Tenant by rescript cannot allege *excommunication* in the demandant; for he came to defend his right by the statute, and this is not part of his right. Br. Rescript, pl. 108. cites 2 E. 4. 25.

55. If *tenant for term of life the reversion to a feme-covert makes default, &c. and the baron and feme are received, the baron shall not confess the action.* For he has taken upon him to defend, &c. quod non negatur. Br. Rescript, pl. 109. cites 7 E. 4. 17.

Theloall's
Dig. Lib.
13. cap. 11.
pl. 37. cites
S. C.

56. *Waste against baron and feme, the feme was received; and to parcel she said, That she and her baron granted her estate to W. B. before which grant no waste done.* Per Pigot, She cannot have the plea; for now she has proved that she cannot lose the franktenement, and for the damages she shall not be received, nor upon lease for term of years. And so see that rescript does not lie in waste, but upon

upon estate for term of life; but *because, if recovery be had against her and her baron, she shall not have cui in vita of the first demise,* therefore for this mischief *she shall have the plea, quod nota.* Br. Rescript, pl. 122. cites 9 E. 4. 16.

57. Lord brought writ of entry sur disseisin of his rent-service, and the tenant made default after default, and he in reversion came, and said, *That he leased the land to the tenant for life, and prayed to be received, and was received of the land where rent was in demand, and no land, quod nota;* for he may traverse the title. And the prayer said, *That the land is hors de son fee, and there the plaintiff shall not shew that it is held of him, and so within his fee; but shall say generally, That within his fee, Prist.* Br. Rescript, pl. 111. cites 10 E. 4. 9.

58. Where a man leases to two for life, and the one is impleaded by *præcipe quod reddat*, and pending the writ, the other releases to him all his right, there, if the other pleads jointenancy, the writ shall not abate; but if he in reversion prays to be received, inasmuch as he leased to both who are in full life, he shall have the plea. Br. Rescript, pl. 112. cites 18 E. 4. 25.

59. In every case where the wife is received for default of her husband, *she shall plead, and have the same advantage in pleading as if she were a feme sole, &c.* Litt. S. 669.

This is regularly true; yet it holds not in all cases;

for if a feme covert be received in an assise, and plead a record and fail, she shall not therefore be adjudged a disseisor, as she should be if she were sole, &c. So if she alone levies a fine executory, and a scire facias is brought against her and her husband, if she be received upon the default of her husband, she shall bar the converse, which if she had been sole she could not do, and in some other cases. Co. Litt. 353. a.—S. P. a Inst. 344.

60. In *quod ei deforceat* in the grand sessions in Wales, in the nature of a writ of right, the defendant said, *That he had majus jus than the plaintiff,* and issue thereupon. At the day the tenant made default, and thereupon a *petit cape* was awarded; at the return whereof J. S. appeared, and prayed to be received *because the feoffment was made to the use of the defendant and his wife, for life of the wife, remainder to J. S. and his heirs.* The demandant counterpleaded the rescript, and traversed the feoffment, and thereupon issue was joined; but at the day of the return of the jury J. S. did not appear, but T. S. his son and heir prayed to be received by his guardian, he being within age, and said, *That his father was dead, and prayed that the parol might demur for nonage:* the demandant counterpleaded the rescript, and took issue upon the feoffment as before; and upon the return of another venire facias the tenant by rescript made default, and another petit cape was awarded against him; and he not appearing, and saving his default, judgment was given against him; error was brought, because the counterplea was of the feoffment, where it ought to be of the reversion, and he cannot traverse the feoffment but the reversion, by whatever means he has it. Judgment was reversed [but as it seems upon another error, which see at (T) [S. C.] Cro. C. 262, 263. pl. 9. Trin. 8 Car. Kiffin v. Vaughan.]

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* See the
note at ((H))
[L] supra.

* ((Q)) [T] Rescript. Judgment.

Br. Re-
script, pl.
42. cites S. C.
Per Martin
J. But Hill.
J. said, the
demandant
shall reco-
ver seisin of
the land
[as is pl. 2.]

But Coke
said, they
are not
alike; for
the feme was
party to the writ,
and he in reversion
shall find surety;
for it may be that
he has nothing
in reversion; contra
of the feme, she
shall not find
surety.

[1. **I**N *formedon* against baron and feme, the feme is received upon default of the baron, and vouches, and the vouchee dies, and resummons is sued against the feme, and she makes default, yet the demandant shall not have seisin of the land, but a *petit cape* shall be awarded; for the feme shall be in [such] case as she was at the time of the rescript, and if she be not resummoned, she shall have *action of disceit*, and shall recover the land. 9 H. 5. 3. For she is party to the writ.]

[2. But if he in reversion be received upon default of tenant for life, and after makes default, seisin of the land shall be awarded upon default of the tenant, and not a *petit cape*. 9 H. 5. 3.]

So where be
in reversion
is received,
and after
makes de-
fault, the
judgment

[3. If a feme be received upon default of the baron, and after the feme, makes default, judgment shall be given upon the default of the baron. 38 E. 3. 12. b. and Brooke Title Rescript. * 46. in abridging this book, says, That no mention shall be in the record of the rescript.]

shall be given upon the first default of the tenant, and not upon default of him in reversion, and then no mention shall be made in the roll of the default, nor of the rescript of the tenant by rescript. Br. Rescript, pl. 69. cites 24 E. 3. 22. — * This should be pl. (45) as it stands in all the editions of Brooke, and so it seems that this is misprinted.

Br. Re-
script, pl.
220. cites
S. C.

[4. If the feme be received upon the default of the baron, and traverses the action of the demandant, and at *nisi prius* makes default, she cannot after in bank save this default, but immediately after the default she is out of court, and the defendant shall recover seisin of the land upon the default of the baron. 22 H. 6. 14. b. 15. Brook, Title Rescript, 120.]

5. A man brought writ of *cofinage*, and the tenant made default after default, and came T. and prayed to be received, and the receipt counterpleaded, and at the *nisi prius* it was found that the tenant was tenant in tail, and so not receivable, and damages 20l. and at the day in bank the *nisi prius* was not returned, and T. who prayed to be received, did not come, by which judgment was given upon the default of the tenant, and writ issued to inquire of damages, which found damages 80l. and judgment given upon it accordingly; and by Finch, though this judgment be erroneous, yet it is executory, being in force; and so see where rescript is offered, and does not take effect, judgment shall be given upon the first default, and as it is said elsewhere, then no mention shall be made in the record of the rescript; and so, as above, execution shall be of the 80l. and not of the 20l. Br. Rescript, pl. 76. cites 39 E. 3. 8.

[93]

6. In *formedon* the tenant made default after default, and one by reversion prayed to be received, and the demandant said that he had nothing

nothing in reversion, and so to issue; after came the prayee, and said that the demandant had entered after the last continuance; upon which the demandant demurred, and it was adjudged no plea for the prayee, and the demandant prayed fieri facias against the sureties, and against the prayee; and it was said that he shall not have it against the prayee. Quære against the sureties; for it was not adjudged. Br. Resceipt, pl. 115. cites 20 E. 4. 16.

7. Where the tenant in præcipe quod reddat makes default after default, or renders to the demandant and the termor, or tenant by statute merchant, or such like, is received to save his term or interest, there the demandant shall recover against the tenant of the franktenement immediately, and cesset executio till the term or execution be incurred. Br. Resceipt, pl. 132. cites 7 H. 7. 13. *But where he in reversion is received, and pleads in bar, by which the demandant is barred, this shall* Per Mordant.

save the franktenement to the tenant for term of life. Ibid.—But where the termor, or tenant by statute merchant, pleads a good bar, and disproves the title of the demandant, yet he shall recover immediately, & cesset executio, till the term or statute be incurred. Note the diversity, quia non negatur. Ibid.

8. Error on a judgment in a quod ei deforceat in Wales was assigned (among other errors) that the judgment was given upon the default of the tenant by resceipt against the tenant by resceipt, where it ought always to be against the tenant to the action: and this was held a manifest error, whereupon judgment was reversed. Cro. C. 262. 263. pl. 9. Trin. 8 Car. B. R. Kiffin v. Vaughan. *See the state of this case at (S.)*

(U) Execution. How.

[1.] IF verdict be found against the prayee, writ shall issue to inquire of the value of the land, and when the extent is returned the demandant shall have scire facias against the pledges, and the prayee. Br. Resceipt, pl. 11. cites 33 H. 6. 6. Per Wideslade prothonotary.—But 36 H. 6. is that the value shall be inquired by the same inquest, which tried the issue. *Br. Scire facias, pl. 10, cites S. C. —* The several editions of Brook have this word (And), but*

it is not in any of the several editions of the year-books; and Fitzh. Tit. Surety, pl. 17. cites S. C. and says only (The demandant shall have scire facias against the pledges, [so quære if the word (And) is not misprinted for (Of)].—And see (T) pl. 6.

For more of Resceipt in general see *Aid, Essoign, Voucher,* and other proper Titles.

• Rescous.

• Rescous is only where he has possession of the thing or person of whom the rescous is supposed to be made; for if one comes to arrest a man, and he is disturbed to do it, he shall not have a writ of rescous but an action upon the case. F. N. B. 102. (F)

(A) Who shall have the *Action*, and against whom.

1. **I**F the *bailiffs or officers* arrest certain persons, and others rescue them from the officers, then *he who caused them to be arrested* shall have a writ of rescue. F. N. B. 101. (G)

2. It appears by the register, That if a writ be directed to the sheriff to levy the *expences of the knights at the parliament*, and the sheriff makes his warrant to the bailiff of the liberty of the Bishop of Ely, to levy the sum assessed, &c. for which the *bailiff by his under-bailiff* takes certain cattle, and would impound them, and other persons do rescue the cattle, and beat the under-bailiff, that the bailiff shall have the writ of rescous against them; and there it seems, that the knights, which should have the money, shall not have a writ of rescous for the same rescous, because it is not a *duty* unto them *by any person certain*, but to be levied of the inhabitants of the town. F. N. B. 102. (D)

Where a prisoner was rescued from the deputy of the bailiff of a liberty, the bailiff brought an action on the case against the rescuer, and adjudged for the plaintiff, and affirmed in error. Jenk. 315. pl. 2.

3. A *warrant* was from the sheriff to the bailiff of the liberty of Pomfret, who executed it, and rescue was made, and the bailiff brought the action against the rescuers to recover damages: and it was held, that the bailiff may have this action in his own name, to recover damages for this. Clayt. 149. pl. 273. Fosterd v. Legerd.

Het. 95. 96. S. C. by the name of Lynne v. Coningham according-ly.—Hutt. 98. S. C. by the name of Coningham's case accordingly. The reason of Hutton and Yelverton was,

4. Defendant was taken on a *ca. sa.* and rescued; an action on the case lies for the plaintiff *either against the sheriff or the rescuers*, but not against the executors of the sheriff; and if it be brought against the rescuers, and recovery be made against them, and afterwards the sheriff sues the rescuers (as he may otherwise) the rescuers may plead such recovery by the plaintiff, and so there is no danger of the rescuers being *twice charged*. Per Richardson Ch. J. Harvey and Croke J. Hutton and Yelverton J. contra. Judgment was given for the plaintiff. Cro. C. 109. pl. 1. Pasch. 4 Car. C. B. Mynn v. Coughton & Ux.

Yelverton was, That the rescue was an immediate wrong to the sheriff or bailiff, and the party, in common presumption, had no prejudice, because his action is transferred to the sheriff, who has more ability to satisfy him.

5. On

5. On a fi. fa. *sheriff returns*, That he had made a warrant to his bailiffs, who had seized diverse goods of, &c. to the value of 160l. and that they were rescued out of their custody; the sheriff is chargeable: and so judgment in C. B. was affirmed in B. R. Pasch. 23 Car. 2. 2 Saund. 343. *Mildmay v. Smith.* See Godh. 276. pl. 299. Hill. 16 Jac. B. R. Slye's case. The Court divided.—Cro. J. 514. pl. 28. Sly v. Finch. S. C. accordingly, & adjournatur.—a Roll. Rep. 57. S. C. says it was agreed by all, that the return of rescue was no excuse to the sheriff; for he might have taken the posse comitatus.—See Return (H) pl. 2.

(B) *What shall be recovered.*

[95]

1. **R**ESCOUS may be, and yet not *vi & armis*; and so it was found in assise, and therefore plaintiff recovered but single damages where he should recover treble damages, if it had been *vi & armis*. Br. Rescous, pl. 2. cites 33 H. 6. Br. Assise, pl. 7. cites 33 H. 6. 20. S. C.

2. A. was indebted to B. in 300l. and was taken on a capias ad respondendum, and rescued by C.—B. brought an action sur le case upon this rescue, and recovered the whole debt of C. and affirmed in error; for none can qualify his own wrong, but the jury might give less damages, if the principal was solvent. Jenk. 311. pl. 93. *Kent v. Kelway.* Lane, 70, Trin. 7 Jac. in the Exchequer. S. C.—Cro. J. 241. pl. 7. Pasch. 8 Jac. S. C.—Jenk. 282.

pl. 10. S. C. and that C. shall not take advantage of A's ability to pay the debt.

(C) *Punishment thereof, by Fine and Attachment.*

1. **I**N waste the plaintiff recovered damages against R. and upon the fieri facias thereof, the sheriff returned that A. and B. servants of R. by his assent made rescous, the plaintiff prayed attachment against A. B. and R. to answer to the contempt, and to deliver the damages, and had it. Br. Rescous, pl. 8. cites 38 E. 3. 9.

2. The under-sheriff of Oxford had process of extent upon a statute staple of goods and lands of Crooker; and the under-sheriff gathered the goods together, and the defendants endeavoured to rescue, but did not prevail; and now they were censured for it notwithstanding that the under-sheriff had not taken any inquiry by the jury, and although that it was before the appretiarum fac. &c. for before such inquiry, &c. the sheriff ought to gather the goods together to be viewed by the jury, by the law; but the final power of safe-guarding, &c. in the custody of the sheriff, is not good until after the inquiry; and it is not material although they did not prevail, &c. for conatus punitur. Also the fine of Crooker was aggravated, because he said to the sheriff (shewing his writ) Put up your bauble. Noy 99. Mich. 41 & 42 Eliz. The King v. Crooker, Higgins, & alias.

3. Sir Samuel Astry said, He had it from Twisden, That the certain constant fine imposed for a rescous is four nobles. Trin. Jo. 198. Pasch. 34 Car. 2. B. R. Penfold, Mainer, & al. S. P. 2 Salk. 686. Anon. —The rescuer was fined 10l. and imprisoned without bail or mainprize, and bound to his good behaviour. Jenk. 315. pl. 8. cites

cites Cro. Hart's case.—Though the usual fine upon a rescous be only four nobles, yet sure that must be understood where the person rescued is retaken, otherwise the fine might be higher; per Cur. 12 Mod. 556. . . . v. Tracy.

The person rescued was fined 30s. Palm. 563. Trin. 4 Car. B. R. the Sheriff of Berk's case.

It was moved for leave to file an information against

one for rescuing a person from the sheriff in the Temple; and per Cur. You had better get a rescous returned, and bring an action upon the case against him; and the rescous, after return thereof, is not traversable. 12 Mod. 556. . . . v. Tracy.

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5. 8 & 9 W. 3. 26. [or 27 Qu.] S. 15. Inflicts a penalty of 50l. for resisting an officer, and the offender being convicted to suffer imprisonment, and be set in the pillory. And if any rescous be made of any prisoner within any privileged place, the person making rescous, or assisting the same, being convicted, shall forfeit to the plaintiff 500l. and in default of payment to be transported to the plantations, there to remain for seven years. And if any person harbour a rescuer, knowing him to be guilty of such offence, he shall be transported for seven years.

S. 16. The penalties of this act, not particularly disposed of, shall go one half to the king, and the other to him that will sue for the same.

S. 17. And if the plaintiff be nonsuit, or a verdict be given for the defendant, the defendant shall have double costs.

An attachment granted upon affidavits made against the defendants for a rescous, before the sheriff had returned his writ, being contrary to the old practice in such cases, was set aside. 8 Mod. 342.

6. A rule was made for the defendants to shew cause on such a day, why an attachment should not go against them for committing a rescous, &c. and now they shewed for cause, that such attachments ought not to be allowed upon affidavits of a rescous; because in such case the parties might be taken into custody before the writ returned, therefore the sheriff ought to return a rescous before the defendants should be prosecuted for it; and the Court was of that opinion, (viz.) That the sheriff ought to return the writ, which, if false, then the plaintiff hath an action against him; but if the return is true, then the action lies against the rescuers; therefore if an attachment should be granted on an affidavit of a rescous before the return of the writ, the defendant could have no action against the sheriff for a false return. 8 Mod. 110. Mich. 9 Geo. Caesar v. Holt & al.

Hill. 11 Geo. Myer v. Yellop.—S. P. By Probyn J. 2 Barnard. Rep. in B. R. 58 Mich. 6 Geo. 2. in case of Demes v. Ponston.

7. A prisoner in the King's Bench in execution was turned over to the Fleet, and being afterwards taken upon an escape warrant was carried through the Old Baily towards Newgate, and there was rescued by the officers of the Fleet, and put into the Fleet. An attachment was granted against the rescuers, and a rule was made to take the prisoner out of the Fleet, and send him to Newgate, according to the statute of 1 Annæ, cap. 6. 8 Mod. 240. Pasch. 10 Geo. 1725. The King v. Dunbar.

8. A

8. A rescous having been returned, the defendant was willing to confess the rescous; but counsel moved, that she might be discharged upon paying a small fine; for though, upon the affidavit of two bailiffs, an attachment was granted against her, and she now lay in York gaol, yet he had *affidavits of 16 people* to shew *that this complaint* against her *was absolutely false*, and without the least colour of foundation. The clerk in court, he observed, would undertake to pay the fine; and therefore upon her payment of the fine, which the Court should set, he prayed a superseas. The Court ordered the affidavits to be read, and on hearing them, they *set but 6d. fine* upon her, without requiring her to go before the master, *and likewise granted a superseas.* 2 Barnard. Rep. in B. R. 229. Trin. 6 Geo. 2. 1733. The King v. Rosamund Robinson.

9. A rescous was returned this term, and a *motion by the rescuers to submit to a fine, or to be admitted to bail, they being advised to bring an action* against the sheriff *for a false return*: the Court declared, that if the rescuers intended to bring an action against the sheriff, they would admit them to bail, and *respite the fine till the event of such suit*; and upon the rescuers offering to bring an action, and entering into a *recognizance for their personal appearance*, the Court ordered them to be discharged. Rep. of Pract. in C. B. 90. Trin. 6 & 7 Geo. 2. 1733. The King v. Tirrell & al.

The Reporter adds, Nota, a verdict being given against the sheriff, the Court on motion, and producing the poitea, ordered the recogni-

zance to be discharged.—Barnes's notes, 304. Trin. 6. & 7. and East. 7 Geo. 2. S. C.

10. Upon a motion for an attachment upon a rescous returned, [97] a rule to shew cause was granted; but the Court afterwards discharged the rule, and said, it was the standing practice; that *in all cases* where a rescous is returned by the sheriff, *a capias pro rescussu*, which is in the nature of an attachment, *issues of course.* Rep. of Pract. in C. B. 126. Hill. 9 Geo. 2. Bridger v. Coleby.

(D) In Criminal Cases.

1. **H**USSEY Ch. J. said, That in the time of E. 4. all the justices said to him, That the *rescue of a felon out of ward or prison was always felony at the common law*; but if the prisoner *rescue himself*, this was not felony but by the statute de frangentibus prisonam. But *return of the sheriff, that J. S. rescussit W. N. felonice*, it is not felony; *contra* * if *J. S. be thereof indicted*, this is felony. And the principal case was, that as the sheriff was carrying a felon to execution, the cart of St. John came with his banner, and the prisoner laid his hands upon the banner, and prayed the privilege of St. John, by which four persons made rescous, and took him from the sheriff, and carried him to the church, and all held this felony; and so see that the judgment does not determine

Br. Corone, pl. 126. cites S. C. by all the justices in Cam. Scac.—S. P. & Hawk. Pl. C. 140. cap. 21. S. 4. cites Fitzh. Endowment 30. S. C. that the sheriff's return of a rescue is not a good

ground for the felony as to this point; quod nota. Br. Corone, pl. 129. cites 1 H. 7. 6.
 the arraignment of the rescuer, unless he be indicted. —* The Year Book is, if it be found by inquest, it is felony.

2. Rescue of a felon before arrest is no felony, otherwise after arrest. Lamb. Eiren. Lib. 2. cap. 7. 233.

Jo. 455. pl. 4. S.C. says, it was resolved by all the justices, except Croke (who afterwards seemed to

3. The breaking of a prison in which traitors are in durance, and causing them to escape is treason, although the parties knew not that there were any traitors there, upon the * statute of 1 H. 6. 5. And so to break a prison whereby felons escape is felony, without knowing them to be imprisoned for such offence; resolved by 10 of the justices. Cro. C. 583. pl. 11. Pasch. 16 Car. B. R. Bensted's case.

assent) and this upon 1 H. 6. 5. and Stamf. Pl. C. 32. [F]—* This seems to be a mistake for the Year Book of 1 H. 6. 5. b. pl. 33. — 2 Hawk. Pl. C. 140. cap. 21. S. 7. S. P. but the serjeant says, that this opinion is not proved by the authority of the case, on which it seems to be grounded. And refers in the marg. to the 1 H. 6. 5. b.

4. E. P. a prisoner for murder was in the place where such prisoners used to stand at the gaol-delivery, and was afterwards condemned, and while he was there, one J. C. being well dressed, went in thither under colour to see him, and watching the time when the keepers were busy, he opened the little door, which was bolted, and went out, and the prisoner followed him; the keeper of the outer door, not knowing them, opened that to them, and they both went together out of the yard, and run down bye-allies into Shoe-lane, and so to White-Friars, but the keepers presently missing the prisoner, made after them, and overtook them in White-Friars, and brought them both back, and thereupon C. was indicted for felony for rescuing P. he being indicted for murder, and upon the evidence it was sworn, that after they were taken, C. said, he had done nothing but what he ought to do to help away his friend, who was in danger of his life, and on this evidence he was found guilty. Kelyng. 45. April 1665. at the Old-Baily. Copeland's case.

[98] 5. Where the imprisonment is of such a nature, that the offence of the prisoner will be felony, if he breaks the prison, he that rescues him is guilty of as high a crime at least; and regularly where the offence of the prisoner himself, if he breaks the prison, does not amount to felony, the offence of any that rescues him will not be felony. 2 Hawk. Pl. C. 139. cap. 21. S. 2.

(E) Exceptions to Returns, and Indictment of Rescous. Good or not.

It is taken for granted in Dyer, That an indictment of rescous is not good without ex-

1. **A**N indictment was, That A. such a day did a felony at H. Per quod quidam W. apud H. prædict. cepit & arrestavit & in salva sua custodia adtunc & ibidem eundem A. habuit, &c. quousque B. adtunc & ibidem insultum fecit & eundem A. adtunc & ibidem, &c. Felonice rescussit, &c. It was much doubted whether this

this indictment was sufficiently certain as to the time of the arrest, and likewise as to the time of the rescue; 1st, Whether the actunc, which is placed before the arrest, may by the copulative which follows, viz. Et in salva sua custodia actunc & ibidem eundem A. habuit refer to the arrest before; for they are distinct sentences divided by the word (eundem, &c.) quære tamen. 2dly, If the last actunc, viz. of the rescous may be referred to the entire day aforesaid, or only to that instant and time of the day when the felony was done, or to any time before in the same day. Browne inclined, That actunc should not extend to the whole day but only to the instant of the felony committed, and that therefore the indictment was not good without adding, scilicet dicto die, &c. But others thought otherwise: ideo quære. D. 164. b. pl. 60. Mich. 5 & 6 P. & M. Fox's case.

precisely shewing the day and year both of the arrest and also of the rescous, and that the time of the latter is not sufficiently shewn by shewing that of the former. 2 Hawk. Pl. C. 235. cap. 25. sect. 78. — And

where an indictment of rescous sets forth, That J. S. committed such a felony such a day, and year, and place, per quod A. B. prædictum J. S. cepit & arrestavit, & in salva custodia sua actunc & ibidem eundem J. S. habuit & custodivit; it is made a quære whether the indictment be not insufficient, because no time of the arrest is alleged in the same sentence with it; and it is doubtful whether the time of the custody which is alleged in the next sentence, by force of the copulative, be applied also to the arrest or not, and Dyer seems rather to incline to the contrary opinion. 2 Hawk. Pl. C. 235. cap. 25. sect. 78.

2. Exception was taken to an indictment for a rescous because it wanted the words * *Vi & armis or manu forti*, and also because the place where the fact was done was not certainly expressed. But the Court held, It was to be intended that the place was where the arrest was, and therefore certain enough without the word, ibidem. And it was held good enough without the words, Vi & armis, for the word (rescussit) implies it to be done with force. Cro. J. 345. pl. 12. Pasch. 12 Jac. B. R. Cramlington's case. case, such an error was assigned, but not allowed; for although it were error at the common law, yet it is made good by the statute 37 H. 8. cap. 8.

2 Bull. 208. the King v. Cramlington, S. C. accordingly. — * Cro. J. 472. pl. 2. Pasch. 16 Jac. B. R. in HART's

3. Hart being indicted in London for a rescous made to a serjeant of the mace upon a plaint in London. Upon not guilty it was found for the king, and a fine assessed of 10l. and imprisonment without bail or mainprize, and to find sureties for his good behaviour: and a writ of error being brought, one error assigned was, Because it is not alleged, that he made the arrest by virtue of a warrant, and then he had not any authority; but because the indictment was, That by virtue of a plaint before such a sheriff, naming him, &c. he was lawfully taken or arrested, it is to be intended, That he had a good warrant; and therefore was well enough: whereupon judgment was affirmed. Cro. J. 472, 473. pl. 2. Pasch. 16 Jac. B. R. Hart's case.

Jenk. 315. pl. 3. cites S. C.

4. On indictment the defendant was found guilty: errors were assigned, 1st, That a warrant was set forth to be directed to 3 conjunctim & divisim to arrest the defendant, (now plaintiff) and that 2 of them did arrest him, which being a ministerial act ought to be done by one or all three, besides this indictment was against 3 defendants for a riot, &c. and the jury found only one of them guilty, which

Nelf. Abr. 978. pl. 2. cites S. C. and says, That the indictment was quashed, but I do not ob-

[99]

serve that
it is reported
so in the
book cited.

which cannot be ; for one alone cannot be guilty of a riot. Poph, 202. Mich. 2 Car. B. R. Harrison v. Errington.

5. Exception was taken to the return of a rescous, for that it was *feci warrantum*, but did not say, *sub sigillo officii* ; but non allocatur, because it was said, *feci warrantum direct'* and it is no warrant unless it be under the seal. 2 Jones 197. Pasch. 34 Car. 2. B. R. Penfold, Mariner, & al.—cites 3 Rep. 44. b. Boyton's case.

6. An indictment of a rescous ought *specially* to set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. 2 Hawk. Pl. C. 140. cap. 21. S. 5.

7. An indictment for rescuing Borlace out of the sheriff's custody in the Inner-Temple set forth, that a *latitat* issued forth against Borlace *termino sancte terinitatis*, whereon he was arrested, and they rescued him, and the indictment was quashed, because it does not appear that any legal *latitat* issued out, *there being no such term as sancte terinitatis*. 12 Mod. 166. Hill. 9 W. 3. King v. Williams & al.

(F) Process, Proceedings, and Pleadings.

Br. Return
de Brieis,
pl. 60. cites
37 H. 6. 27.
S. C.

1. **I**N *trespass*, if the sheriff returns rescous upon the defendants, *capias* shall issue to take them to answer to the rescous in proper person, and not by attorney. Br. Process, pl. 85. cites 37 H. 6. 29.

2 Hawk. Pl.
C. 302. cap.
27. S. 113.
a. b.

2. *Process of outlawry* lies upon a return of rescous. 2 Inst. 665. accordingly, and cites 13 H. 7. 21. pl. 7. Contra Fitzh. Process 56, 213. 29 E. 3. 18. a. b.

3. The attachment must be *special*, reciting the return of the rescous the same term. Toth. 270. cites 37 Eliz. Aichurch v. Bold.

Godb. 125.
pl. 145. S.
C. by name
of Yarram
v. Brad-
shaw.

4. In action on the case by the sheriffs of Norwich against the defendant, for that a *ca. ja.* was directed to them to take the body of the defendant ; *th. y.* 20 Feb. 25 Eliz. directed their warrant to 3 serjeants of the city to take him in execution, by virtue whereof they, on the 26th of Feb. in the same year, took him in execution, and that he was rescued and escaped. Upon not guilty pleaded, the jury found specially, that he was arrested about the 26th of Feb. and then and there *seipsum rescussit*. It was insisted in arrest of judgment, that this declaration was ill, 1st, because the plaintiffs allege that they made a warrant, but say not, *sub sigillis sigillat*, 2dly, Because the plaintiffs say they were chargeable with the debt, but not that they were charged, neither do they shew that they were otherwise damnified, without which they have no cause of action : and 3dly, Exception was to the verdict as uncertain whether the rescue was before or after the 26th of Feb. for if it was after the day it will not maintain the declaration, but if before the day then it

It continues a rescue at the day. But as to the 1st the Court held it to be the usual form; 2dly, * That action lies for the Sheriff's before any suit brought against them, they being always chargeable, and the party shall not take advantage of his own tort; 3dly, That the *verdict is well enough if the rescous was before the suit commenced*. And the plaintiff had judgment. Cro. E. 53. pl. 3. Hill. 29 Eliz. B. R. the Sheriffs of Norwich v. Bradshaw.

5. Sheriff returned a rescue upon A. B. C. D. & E. and one T. and said, quod virtute brevis, &c. such a day, year, and place, cepit & arrestavit prædictum T. et quod A. B. C. D. & E. prædictum T. in custodia mea adtunc & ibidem existentem extra custodiam meam cep. runt & rescusserunt, & prædictum T. adtunc & ibidem se extra custodiam meam prædictam rescussit; and for not shewing the time and place of the rescue made by A. B. C. D. & E. they were discharged. As to the adtunc & ibidem, that refers to the existentem in custodia, and not to the fact of the rescue; but the other part has made it good against T. himself. And though exception was taken for the *repugnancy*, because the *rescue is alleged upon T. in custodia existentem*, which could not be, for so long as he is in custodia it cannot be a rescue, sed non allocatur. Palm. 563. Trin. 4 Car. B. R. the case of the Sheriff of Berks.

6. One shall not be *admitted to make a fine* unless he is present in person at the rescue returned; but he may take exceptions without being in person. Palm. 553. Trin. 4 Car. B. R. by Jones, in the case of the Sheriff of Berks.

7. Case against the head bailiff of Westminster for an escape upon *mesne process*, who *pleaded a rescous, but did not plead, that he returned the rescous: and upon demurrer it was adjudged a good plea in mesne process, though it would be ill upon an execution. 2 Lev. 144. Trin. 27 Car. 2. B. R. Hill v. Montague.

* In such case upon demurrer this was resolved a good plea in action

upon arrest on the mesne process, but not upon execution, according to the case of MAY v. PARRY and LUMLEY, Cro. J. But exception being taken, that he did not plead that he returned the rescue, curia advisare vult; but afterwards they resolved it good enough; and judgment for the defendant. And HILL and MONTAGUE's case was cited to be so resolved, 27 Car. 2. B. R. 3 Lev. 46. Trin. 33 Car. 2. [but it seems misprinted for some pages together, and that it should be Hill. 33 & 34] Ld. Gorges v. Gore.

An affidavit was made of a rescous of one taken by mesne process, and thereupon an attachment moved for. Per Cur. Upon a return of rescous it would go of course. But Holt Ch. J. would distinguish between this and the case of rescous upon writ of execution; for there the Sheriff cannot return a rescous, and therefore the Court can have no other grounds for an attachment but affidavits, and ought to be contented therewith: but here a rescous might be returned, which being matter of record, and by consequence a better motive, ought to be given to the Court; yet the Court seemed against him, and rule to shew cause why attachment should not go. 6 Mod. 141. Pasch. 3 Ann. B. R. Anon.

Upon an affidavit of a rescue upon mesne process an attachment was prayed against the rescuers, but denied; for per Holt Ch. J. the rescue must be returned upon the writ. and the motion and attachment founded upon that; but it is never the course to grant it upon affidavits. 2 Salk. 586. pl. 3. Hill. 3 Ann. B. R. Anon.

The reason is, that *anciently every man being in decenna had bail*, and now is presumed to have bail ready to be forth coming, and therefore the Sheriff is not obliged in duty to take the posse comitatus to assist him; but when judgment is passed, and his bail do not surrender him nor pay the condemnation-money, then a capias issues, to which there can be no bail; and there it is presumed that he will not be forth-coming, because neither he nor his bail have satisfied the judgment; and therefore the Sheriff then ought to take the posse comitatus, and consequently it cannot be a good return that he took the body, but that it was rescued; and the party may have an action of escape against the Sheriff on this return, or a new capias for the return of an ineffectual execution; but if the Sheriff had permitted him to go at large, he could have had no new execution; for an ineffectual execution is returned, and so there is a pledge for satisfaction in the custody of the Sheriff, for which he is only answerable. G. Hist. C. B. 19, 20.

8. In

8. In the case of a rescue there are 2 ways of proceeding: if the rescous is returned to the philazer, and process of *outlawry* issues, and the rescuer is brought into Court, he shall not be discharged upon *affidavits*; but where upon the return of a rescue an *attachment* is granted, and the party examined upon *interrogatories*, upon answering them he shall be discharged. 2 Salk. 586. pl. 1. Mich. 8 W. 3. B. R. the King v. Belt.

[101] 9. *Indictment* for a rescous; setting forth, *quod cum virtute brevis, &c. de fieri facias, and a warrant thereon, he levied the goods, &c. and the defendant rescued them*: this is ill; for the *fieri facias* should be set forth at large. 8 Mod. 357. Pasch. 11 Geo. the King v Westbury.

Rep. of
Practice in
C. B. 84.
S. C. and
that the pro-
ceedings
were intire-
ly regular.

10. Defendant was brought into court by *habeas corpus*, and upon the return it appeared, that he was detained by a writ of rescous issued by the Filazer, founded on a *rescue* returned by the sheriff on a *capias ad respondendum* between the parties, in which writ of rescous was contained an *alias capias* against the defendant to answer the plaintiff according to the tenor of the first *capias*. Motion was made to discharge the defendant, the writ of rescous being complex, i. e. to answer the king for a contempt, and to answer the plaintiff in a civil action. The Court denied to make any rule, the writ of rescous being in the *common form*. Barns's Notes 302, 303. Hill. 6 Geo. 2. Tasker v. Geale.

Rep. of
Practice in
C. B. 88.
S. C.

11. A rescous was returned, and an *attachment* being issued and the defendants taken thereupon, the defendants entered into *recognizances* for their appearance to be examined upon *interrogatories*. The Court were of opinion, that a *rescous* returned by the sheriff is not a matter traversable, but *amounts to a conviction*, and the party taken upon an attachment founded upon a rescous returned is not proper to enter into *recognizance* to be examined upon *interrogatories*, such attachment being in the nature of a *capias pro fine* to bring the party into Court to be fined; and therefore *discharged the recognizances as irregularly taken*. Barns's Notes 303. Pasch. 6 Geo. 2. the King v. Philips & al'.

For more of Rescous in General, See Escape, Return (A)
and other Proper Titles.

Rescuer.

(A) By the King. Cause Good, What is.

But it was
said in the
time of H.
8. That

1. IF lord and tenant are, and the tenant is attainted of felony, and the king has *annum diem & vastum*; yet if the lord enters without due process, and the writ sued to the escheator, the land

land shall be seised, and he shall answer for the mesne issues and profits. Br. Refeiser, pl. 36. cites 8 E. 2. & Fitzh. Traverse 48. where the interest of the king is certain and determined, the party may enter; quære. Ibid.

2. The king's tenant had issue three daughters, and died; the king made livery to the one of her portion, and the other surmised that her portion was too great, and prayed re-extent, and that the king re-seise, and had it, and scire facias against the eldest; and this without the third coparcener. Br. Refeiser, pl. 33. cites 2 E. 3. and Fitzh. Livery 8. Br. Scire facias, pl. 222. cites 2 E. 3. 20. & Fitzh. Livery 8.—If the king's tenant has 2

daughters, and dies, the one of full age, and she gets livery of her part, and after the other comes to full age, and she shews grievance that the part of the other is too great, she may have scire facias to have the land re-seised, and partition made de novo. Br. Refeiser, pl. 38. cites 10 H. 4.

3. The king's tenant obtained licence upon false suggestion, and aliened and retook, supposing that he was seised in fee where he had only tail; and the king being thereof ascertained by matter of record brought scire facias and re-seised. Br. Refeiser, pl. 24. cites 21 Aff. 15. [102]

4. Sci. fac. was upon a fine which was levied mesne between an ouster le main of the king and a re-seiser; and if the re-seiser be by former title before the levying of the fine, this shall avoid the fine. Br. Scire facias, pl. 127. cites 24 E. 3. 64. Br. Refeiser, pl. 13. cites 24 E. 3. 33.

5. It was found by office, that J. tenant of the king died seised, and E. his son and heir, and of full age, by which E. had livery, and after it was found by another office that J. had issue W. who was his heir, within age, by which scire facias issued to re-seise; and E. came and said, that W. was of half blood, and that the land was specially entailed to his father and mother; et non allocatur, inasmuch as it did not appear in the office. Br. Scire facias, pl. 220. cites 30 Aff. 28.

6. If tenant of the king dies, his heir within age, and the feme is endowed in Chancery; and after the land is evicted from her after livery to the heir, the land shall be re-seised by scire facias, and the feme newly endowed. Br. Refeiser, pl. 20. cites 43 Aff. 32. Br. Scire facias, pl. 161. cites S. C.

7. It was held for law in Chancery, that if the heir sues livery after the lands are seised into the hands of the king, and sues inquest in one county and not in all, and by colour thereof enters in all the counties, that the king by this shall re-seise all his lands by reason of his abatement in parcel; and he shall be charged of issues in the mesne time: and the Lord PERCY was in such case, and put himself in grace of the king, and made fine. Br. Refeiser, pl. 4. cites 44 E. 3. 12. And the same year, 44 E. 3. is such a case after the death of Tyban. de Berdon, that the Lord Bartholomew

B. who married one of his heirs, in suit of his livery omitted an advowson, and therefore all was re-seised into the hands of the king; and it was said, that the LORD PERCY, MOLINS, GREEN, and others, were in the same case; quod nota. Ibid.

So where the heir of the king's tenant has land in one county, and land with advowson in another county, and proves his age in the first county, and for this has livery of all, there all shall be re-seised. Br. Refeiser, pl. 26. cites 50 Aff. 7. & 44 E. 3. accordingly.

8. If the king's tenant dies, his heir within age, and a stranger abates in part of the tenements, and the heir at full age sues livery of the rest, and after the abatement is found by office, it was greatly doubted

doubted if the king shall reſeiſe all or not; but by ſeveral, if the *heir* had been of full age at the time of the death of his ancestor, then there ſhall be no reſeiſer; but *e contra* where he is within age. *Quære* of this diverſity: for in the one caſe the king ſhall have the land till he makes livery, and in the other the king ſhall have primer ſeiſin, which ſhall be of all, as in other caſes, as it ſeems to me. And it was agreed, that the abator ſhall be charged with all the iſſues. Br. Reſeiſer, pl. 37. cites 12 R. 2. & Fitzh. Livery 28.

9. [Where the *rules of foundation* are not obſerved the king ſhall ſeiſe, as] it was agreed, arg. in treſpaſs, that *where it is found by office that religious [houſes] do not obſerve their number, or do not perform their prayers and funerals;* that the king ſhall ſeiſe. Br. Reſeiſer, pl. 2. cites 35 H. 6. 49. And ſays, that ſo it was done after in the time of H. 8. for erecting the college of the Cardinal of York in Oxford and Ipſwich; quod nota.

[103] (B) By the King. In what Caſes *againſt his own Grant.*

1. **I**T was ſaid, that if *office be found for the king, which intitles a party, or the eſcheator ſeiſes, &c.* and the king makes livery to the party, and by another office it is found for the king, which intitles another, yet the king can not reſeiſe without *ſcire facias*, by a ſtatute which is called the ſtatute of Lincoln, Anno 29 E. 1. De Eſcheatoribus. Br. Reſeiſer, pl. 1. (bis) cites 28 H. 6. 9.

S. P. For now he may ſue againſt the heir; 2. When *lawful livery is made to the heir pending traverse exhibited by a ſtranger*, yet the land ſhall not be reſeiſed, quod nota. Br. Reſeiſer, pl. 21. cites 1 H. 7.

and alſo, if the land ſhall be reſeiſed, and leaſed in farm, there, if the traverse paſs againſt the traversor, the king ſhall have the rent and the iſſues, and this ſhall be a tort to the heir; for the king was firſt intitled by tenure in capite, the heir of full age: contra where the king had cauſe to retain the land for a certain time, and he delivers it to him within the time, yet the traverse remains good, and the land ſhall be leaſed to farm. Br. Office Devant, pl. 26. cites 1 H. 7. 12, 27.

(C) Reſeiſer. In what Caſes *upon New Office or without Scire facias.*

Br. Scire facias, pl. 221. cites S. C.

1. **I**F the king makes livery upon *insufficient office*, he may reſeiſe without *ſcire facias*; *contra*, if he makes livery upon *good office*, and after another title is found for the king, and this by the ſtatute of Lincoln. Br. Reſeiſer, pl. 32. cites 18 E. 3. and Fitzh. Livery, 3.

Br. Livery, pl. 23. cites 24 E. 3. 64. S. C.—Br. Scire Facias, pl. 127. cites S. C.

2. P. W. brought *ſcire facias* againſt J. D. to execute a fine, by which J. M. gave the manor of M. to B. who rendered to him for term of life, the remainder to the father and mother of the plaintiff in tail, &c. and the tenant had aid of the king, and now came procedendo, and the king and the tenant ſaid, in bar, that H. Spencer was ſeiſed, and forfeited, to the king, and the king ſeiſed, and the ſaid

said J. D. sued to the king by petition in parliament, making suggestion that he was disseised by Spencer, and prayed that the king would do reason and law; and the king sent the petition into Chancery, and commanded to do right and reason, by which the chancellor sent to Shard and others Anno first of the now king, to enquire of his right, where it was found by office that he was disseised by Spencer, and the king sent into the Exchequer if they found any thing in the Treasury among the charters of the said Spencer touching these lands, who certified that they found nothing, by which the king sent to the Exchequer to oust his hands, and that the king after, perceiving, that he did not pray restitution in his petition, and the office returned was not sent into B. R. or C. B. (which are places to try franktenement, and not in the Chancery) and that the serjeants of the king were not called to it, and also, after a charter was found in the Treasury, by which J. M. the conusor infeoffed Spencer, and so the king ousted tortiously, and not by due process, therefore the king resealed, and the fine was levied in the mesne time between the ouster of the king and the refeiser, judgment of execution, and shewed transcript of the petition, and of the office, and of the charter sub pede sigilli; the plaintiff said, that Hugh Spencer disseised J. M. absque hoc that J. M. infeoffed him, and prayed execution. Shard said, the king ought not to have resealed, but ought to have sued first scire facias when he had ousted his hands before, and notwithstanding restitution was not prayed in the petition, and the others surmised default in the bar, that no judgment was, that M. re-have the manor, but that the escheator oust his hands, yet in the petition was sufficient matter, per tot. Cur. And as to the calling the serjeants of the king, the party cannot compel it, by which the issue was taken upon the disseisin of Spencer; quod nota; and so see that the king shall not resealed, as here, without scire facias, because he was ousted by judgment, contra where he is ousted by undue means, there he may resealed without scire facias, as it seems. Br. Refeiser, pl. 13. cites 24 E. 3. * 33.

* This seems misprinted, and that it should be (64. b. pl. 69.)

3. If it is found that the king's tenant died seised, and that A. is heir to him, by which A. gets livery, and after it is found by another office that he died seised, and that B. is heir; the king shall have scire facias, and shall resealed. Br. Refeiser, pl. 25. cites 30 Aff. 28.

Where the king has made livery to one, and after another office is found,

which intitles another; yet the king cannot resealed without scire facias awarded against the first who has livery; and this by the statute of Lincoln. Br. Scire Facias, pl. 9. cites 28 H. 6. 9— Br. Refeiser, pl. 1. cites S. C.

So if the youngest son be found heir by office, and the king makes to him livery, and after the eldest is found heir by office, the king shall resealed, and shall make livery to the eldest. Br. Refeiser, pl. 31. cites F. N. B.

4. Where the king grants lands. which he has in ward, to one for term of life, the remainder over in fee, this shall be resealed upon scire facias to repeal the letters patent, and livery shall be made to the heir; and so it was, upon long debate; quod nota. Br. Refeiser, pl. 7. cites 7 H. 4. 7.

Br. Livery, pl. 16. cites 7 H. 4. 41.

5. Where a man is attainted by parliament, and the king seises, and makes gift in fee, and the heir is restored by parliament, the king shall

Br. Scire Facias, pl. 58. cites 7

[104]

H. 4. 20.— shall not resume, and make livery to the heir; for the king gave Br. Livery, in fee simple, and therefore cannot resume, and therefore the heir pl. 13. cites S. C.— But shall have scire facias against the tenant, and shall recover against where the him. Br. Reseifer, pl. 6. cites 7 H. 4. 17.

king is seised by attainder of felony, and leases for life, and a stranger has title, the king shall resume and make livery; for the fee and reversion are in the king. Br. Reseifer, pl. 6. cites 7 H. 4. 17.— And if the king makes feoffment in fee of the lands of the heir in ward; yet he shall resume, and make livery to the heir, for he shall do homage, and out of the hands of the king shall the lands be delivered, and the king had not the fee to give in this case. Ibid.— Br. Scire Facias, pl. 58. cites 7 H. 4. 20.— Br. Livery, pl. 13. cites S. C.

6. After livery sued out of the hands of the king, and a new title found for the king, there the king may reseise without scire facias within the year, contra after the year. Br. Reseifer, pl. 38. cites 10 H. 4. and Fitzh. Traverse 28. and 32.

7. If a man traverses an office within the month, and has the land to farm, and after it is adjudged that the traverse does not lie, the land shall be reseised without scire facias. Br. Reseifer, pl. 28. cites 4 E. 4. 29.

S. P. Br. 8. If land be in the hand of the king by 20 diverse titles, the party shall traverse all, and so he did, and it was found for him, by which he had ouster le main, and after another title is found for the king, the king shall not reseise; but quære, if he shall not have scire facias, and after his reseiser. Br. Reseifer, pl. 27. cites 4 H. 7. 5.

For more of Reseiser in general see Office or Inquisition, Prerogative, and other proper Titles.

(A) What.

[1. **A** RESERVATION is always of a thing not in esse, but newly created, or reserved out of the land or tenement demised. Co. Litt. 47.]

2. If a man leases by indenture to two, with penalty of 20l. for non-performance of the condition in the indenture, and the one seals the deed, and both enter, debt of the 20l. shall be against both; for this is as one reservation; quod mirum; for it is not like to the case where 20s. rent is reserved, and for non-payment to forfeit at each time

time 2s. *nomine penae*; for the one may be annual, and the other is only a sum in gross. Br. Reservation, pl. 9. cites 38 E. 3. 8.

(B) Reservations. * *What Things; and out of what Things they may be.* * See (A. a) S. P.

[1. IF a man grants a future interest of land, as for certain years to commence ten years after, he may reserve a rent thereupon payable presently. H. 7. Ja. B. per Cook.]

[2. A rent cannot be reserved out of any incorporeal inheritance, as advowsons, * commons, offices, corodies, multure of a mill, tythes, * fairs, markets, liberties, privileges, franchises, and the like. Co. Litt. 47. 142.]

5 Rep. 3. Trin. 30. Eliz. B. R. Jewel's case.—Nor upon a lease

of passage-money for boats in a navigable river. 2 Vent. 69. Baynton v. Bobbet. Or other thing which is not in demesne; yet where a person has common, paying a penny, though it be not a rent, a distress may be taken for it; because the commoner has a benefit by it. Cro. E. 546. by Haughton J. in case of LOVELACE v. REYNOLDS, cites 26 H. 8. and by intendment it began with the common by agreement of the parties.

* S. P. Because it does not lie in tenure. Arg. Mo. 163 Mich. 26 & 27 Eliz. in case of Saffron Walden.—But it may be reserved by the king, though not by a subject; per Popham Sol. Gen. Arg. Mo. 168. in the case of Saffron Walden.—Because he may distrain in any other lands of the Grantee. 5 Rep. 4. a. b. in Ld. Mountjoy's case.—2 Vern. R. 714. Arg. S. P. And such grant by a subject confirmed by subsequent charters from the king, reserving the same rent makes the rent good. Att. General v. Mayor of Coventry.—Cowper C. assisted by Ld. Ch. J. Parker and King, held, that the king might reserve a rent out of a franchise or matter incorporeal, as well as out of lands, and might distrain on any other lands of the tenant for it. Wms's Rep. 307. Hill. 1715. Attorney General v. Mayor of Coventry.

[3. If a man demise a *vesture* or *herbage* of his land, he may reserve a rent upon it; because it is manurable, and the lessor may distrain the beasts upon the land. Co. Litt. 47. 142.]

[4. A rent cannot be reserved out of a thing which lies only in grant. Co. Litt. 142. Because there can be no distress.]

[5. A man cannot reserve a rent upon a lease of tythes for default of distress. P. 3. Ja. B. R. between * Tallantine plaintiff, and Rawlton and Denton defendants, adjudged. And H. 4. Ja. B. R. Rot. 92. between † Richmond and Garter, adjudged; for in those cases the lease of a Bishop [was] adjudged void; because §[one] cannot reserve a rent upon a lease of tythes for default of distress. Contra 11 H. 4. 40. b. admitted. Mich. 15 Ja. B. R. between ‡ Smith and Bowles, per totam Curiam; (præter Doderidge who seemed e contra) because he has an inheritance in them.]

§[106] D. 88. Marg. pl. 104. contra, that a rent may be reserved out of tythes, cites Trin. 17 Jac. Lady Denny's case.—

* Cro. J. 111. pl. 10. Hill. 3 Jac. B. R. and there Williams said that so it is of all other things which lie in prebend or rector, where no distress can be taken.—Mo. 778. pl. 1078. Talen-tire v. Denton. S. C.—† Cro. J. 173. pl. 14. Trin. 5 Jac. B. R. S. C. by name of Rickman v. Garth.—‡ S. C. Cro. J. 498. pl. 5. and 3 Bulst. 290. But in neither of those books do I observe any thing of the lease being of tythes.

[6. If the lord grants his *seignior* rendering rent, this is a good reservation for the possibility of the escheat, and then distress may be upon the land. 1 H. 4. 1. b. 5 H. 7. 36. dubitatur. 3 H. 6. 22.]

[7. If

If A. has a *rent-service* or *rent-charge*, and will grant this rent to another for term of life, by deed indented, rendring to A. certain rent, the reservation is void of the rent; because *rent cannot be charged with other rent, &c. Kelw. 161. b. M. 3. H. 8. — * S. P. Br. Affise, pl. 2. cites 3 H. 6. 20. For rent cannot be put in view.

[8. Upon a feoffment or conveyance of land, a man cannot reserve to him parcel of the annual profits themselves, as to reserve the *vesture* or *herbage* of the land, or such like; because it would be repugnant to the grant. Co. Litt. 142.]

9. Rent may be reserved out of land given in exchange for equality. See partition (G) (G. 2)

Br. Warren,
Pl. 3. cites
S. C.

10. If a man has a *warren* in another's land, and after purchases the land, and makes a feoffment of the land reserving the warren, he shall have the warren; and e contra if he does not reserve, nor except the warren. Br. Extinguishment, pl. 5. cites 35 H. 6. 56.

11. A rent may be reserved upon a lease of rent-corn; for a man may reserve a rent upon a lease of rent, and the rent is not parcel of the reversion, but only incident to the reversion; and the lessor has the same inheritance therein as he has in the reversion. Ow. 32. Pasch. 7 Eliz. Anon.

Le. 333.

Arg. —

rent re-

served out

of an hun-

dred for life

is void.

Cro. J. 173.

And per

Tanfield J.

this point

was first

adjudged

29 Eliz.

between

Monnington

and Try.

12. Lease of land, hundred, *multure*, and *advowson*, all the rent shall issue out of the land. Arg. 5 Rep. 4. in Ld. Mountjoy's case, cites 30 Aff. 5.

Poph. 214.

S. C. ac-

cordingly

by Popham

and Gaw-

dy.—Mo.

405. pl.

544. S. C.

and agreed

the rent to

be void;

but Fenner

and Clench

thought the

37l. should

not be pay-

able as a

sum in gross

by reason of

the obligation.

But Popham

contra as to

the last point,

& adjournatur.—

Cro. E.

362. pl. 24.

Mich. 36 &

37 Eliz. S. C.

Adjudged

for the plain-

iff; but the

case there is

only upon

the point of

estoppel, which

13. In debt on a bond, which recited, that S. demised to W. for 21 years, if S. should so long live, all that his house and lands in the parish of P. in which he had an estate for life by copy of Court Roll, &c. under the yearly rent of 37l. and was conditioned to pay the said rent of 37l. yearly according to the true intent of the articles, &c. the obligor pleaded all this matter, but said further, that the obligee had not any estate in the lands, &c. for his life, or by copy. The plaintiff demurred and had judgment in C. B. Whereupon error was brought in B. R. and there Popham and Fenner agreed as to the point of reservation that it was void. But whether the 37l. should be payable as a sum in gross by reason of the obligation, they were divided in opinion. [But no judgment is mentioned to be given.] Ow. 110, 111. Pasch. 38 Eliz. Stroud v. Willis.

But Popham contra as to the last point, & adjournatur.—Cro. E. 362. pl. 24. Mich. 36 & 37 Eliz. S. C. Adjudged for the plainiff; but the case there is only upon the point of estoppel, which they held this to be.

[107]

14. When a man makes a void lease rendring rent, the reservation is also void; because the land is the consideration and recompence for the rent: but where a man reserves a rent upon a grant or lease, which grant or lease are good, but the thing out of which the rent is issuing cannot be charged with the rent, there the reservation is good. As where it is out of an *advowson* or *messuagialty*,

nalty, &c. Per Fenner. Ow. 111. Pasch. 38 Eliz. B. R. in the case of Stroud v. Willis.

15. Whether a rent may be reserved out of *coppices*? It seems not. Clayt. 100. *Campion v. Thorpe*.

16. Though it be out of land or tenements, yet it must be out of an estate that passes by the conveyance, and *not out of a right*; as if the disseisee releases to the disseisor of the land reserving a rent, the reservation is void; *et sic de similibus*. Co. Litt. 144. Arg. Le. 148. in the case of Read v. Nash.

17. Rent may be reserved out of a *mesnalty*, as 1 H. 4. because of the possibility of an escheat. Noy 60. in the case of *Lovelace v. Reynolds*. Cro. E. 546. S. C. & per Walmley it

can be reserved of no other thing, but of such whereon an entry can be made, and a rent cannot be granted out of a *mesnalty*.

18. Rent reserved upon a lease of a *warren* of conies was held by the Court (absente Anderson) not to be a rent but a *seignory* [sum] in gross due by reason of the contract. Noy 60. Anon.

19. A reservation of rent on a *wine-licence-lease* is but a personal contract, which does not run with the licence. Hard. 88. pl. 6. Mich. 1656. in the Exchequer. *James v. Blunk*.

20. An inheritrix *carves out a term for 1000 years to trustees*, which she and her intended husband declared to be for the *husband for life*, and after his decease to the wife and her heirs; afterwards by *fine* she concessit they grant a term of 21 years, reserving the rent to the husband and wife, and the heirs of the wife; the administrator of the wife brought a bill to have the benefit of the rent reserved; but the Court dismissed the bill. 2 Vern. 62. Pasch. 1688. *Saunders v. Beal*.

21. Rent cannot be reserved out of the *rents and services of a manor*; admitted. 12 Mod. 151. Mich. 9 W. 3. in the case of *Winter v. Lovedur*.—Carth. 429. S. C.—5 Mod. 382. S. C. by name of *Winter v. Loveday*.

(B. 2) *Good*. In Respect of the Thing out of which. *Part of the Estate or Thing granted*.

1. IT was admitted that where the *baron and feme, seised in jure uxoris, lease for life, reserving the reversion to them, and to the heirs of the feme rendering rent*, and after the baron dies, and the feme grants over the reversion, and the lessee attorns; this is a good grant. And so see that though the lease for life be discontinued, yet the reservation of the reversion to the heirs of the feme is good; for if it was not so, then the grant of the feme shall be void. Br. Reservation, pl. 34. cites 50 Aff. 1.

2. Where A. levies a *fine to B. sur consance de droit come ceo, &c.* which is fee-simple without the words (heirs) there B. cannot render the land to A. for term of life, the remainder to himself in tail; for he who is seised in fee, and gives, &c. cannot reserve remainder to himself in tail, the fee-simple never being out of him; *quod nota bene*. Br. Reservation, pl. 41. cites 1 H. 5. 8.

3. A

As where a man seised of an advowson in fee, grants it to another, reserving the advowson to himself for term of his life, this is a void reservation; for he had fee before. Ibid.—And it seems also that it is void, inasmuch as it is repugnant to the grant. Ibid.—And if a man grants his advowson to another, reserving the presentation for term of his life, this is a void reservation; for he reserves the same thing which he has granted. Ibid.—So if a man leases an acre of land for life, reserving the herbage of the same acre, this is a void reservation; for it is parcel of the thing which he granted, and therefore is repugnant and void. Ibid.

4. If a man leases land reserving common out of it, or the herbage or grass, or profits of the land demised, this is a void reservation; for it is parcel of the thing granted, and it is not like where a man leases his manor, &c. except *White-acre*; for there the acre is not leased, but here the land is leased, therefore the reservation of the herbage, vesture, &c. is void. Br. Reservation, pl. 46. cites Doct. & Stud.

See (D) (C) Reservation. To whom it may be made.

Co. Litt. 43. a. S. P. [1. IT is a maxim in law, that a rent ought to be reserved to him from whom the estate of the land moves, and not to a stranger. —As if I make a lease Co. Litt. 143. b.]

for years during my life and my wife's life; if I die the rent is gone, for she is a stranger, and she shall never have the rent, because she has no interest in the land. Brownl. 39. a. nota, towards the bottom of the page.—But if A. is seised of certain lands, and A. and B. join in a feoffment in fee, reserving a rent to them both, and their heirs, and the feoffee grants that it shall be lawful for them and their heirs, to distrain for the rent; this is a good grant of a rent to them both, because he is party to the deed, and the clause of distress is a grant of the rent to A. and B. as it appears before in the chapter of rents; but if B. had been a stranger to the deed, then B. had taken nothing; and upon this diversity are all the books, which prima facie seem to vary, reconciled. Co. Litt. 213. a. b.

S. C. cited by Hobart Ch. J. Mo. 903. in the case of Colt and Glover v. Bishop of Litchfield, &c. That a lease was made by the [2. If the father leases for years to commence, after his death reserving a rent to his heir; this is a good reservation, though it never was in the father, because he is *pars patris*, and that this is for the benefit of the heir, and not to charge him. Mich. 14 Ja. B. Oates and Frithe, by Warburton and Winch against Hubbard, and at the last term Nichols was with Warburton. Litt. 80. b. admitted; for he says that condition cannot be reserved but to the lessor or his heirs.]

father and his eldest son, of the land of the father rendering rent to the son, to commence after the father's death. The father died; the rent was adjudged void in the reservation, though in the execution the son was now heir to the father.—Hob. 130. pl. 172. S. C. That the reservation of the rent was held utterly void; for though the son did prove heir, it bettered not the case by event, but the reservation must have been to the heir or heirs of the lessor, by that name; for that is the only word of privity in law requisite in reservation of rents and conditions; for the heir is in representation, in point of taking by inheritance, *eadem persona cum antecessore*; and though, in such a case, the rent could never be demanded by the father, yet the heir shall take it from the father as inherent, and rising from the root of the reversion, which was his father's, and which he takes by descent from his father; and so the rent itself which was in the father, though not to demand, because it was not yet due, but yet it was so his, that he might release and discharge it by the word rent, though not by the word action.

There is the only word of privity [3. If A. the father and B. the son join in a deed of lease, reciting in the premisses that B. is his son and heir apparent, and after

after by the deed they *lease for years to commence after the death of the father (the father only being seised in fee of the land) reserving a rent to the said B.* This is a void reservation, because he is not named heir by the reservation, but to take merely by his proper name, * and so all one as if it had been reserved to a stranger. Mich. 14 Ja. B. Oates and Frith adjudged. Hobart's Reports 174. Same case.]

in the law requisite in reservation of rents and conditions. Hob. 130. pl. 178. S. C.—S. C. cited 2 Sand. 370. in case of Sacheverel v. Froggat.

[4. If a man gives land in tail, reserving a rent to his heirs; this is a good reservation, though the heir cannot take in his life; for he shall take it by purchase after the death of the donor. Contra Co. Litt. 99. b.]

[5. But if before the statute of *quia emptores terrarum*, a man had granted land in fee to hold of his heirs; this had been a void reservation, and he should hold of the grantor as he held over. Co. Litt. 99. b.]

[6. So if a man gives land in tail at this day to hold of his heirs, this is a void reservation, and he shall hold as donor holds over. It seems Co. Litt. 99. b. is so to be understood.]

[7. If the baron seised in fee had aliened before the statute, reserving certain rent to him and his wife; this is void as to the wife. 31 Aff. 31. by Shard and Thorpe.]

reservation cannot be to him who gave nothing, nor had any thing in reversion. Per Thorp and Shard J.—So of such a gift in fee by the baron, to hold of him and his feme, &c. before the statute, the feme there takes nothing; for she was not donor. Br. Ibid.—S. P. Per Cur. Br. Reservation, pl. 38. cites 49 E. 3. 15.

[8. The king may reserve a rent to a stranger. Co. Litt. 143. b.]

(D) Reservation. To a Stranger.

See (C)→
(N) p. 6.

[1. If a man lease for life or years, reserving a rent to a stranger, it is void. Co. Litt. 47.]

S. P. For there is no privity. Br. June Ch. J. Reservation, pl. 15. cites 14 H. 6. 26. Per

[2. If before the statute of IV. the baron seised in fee had made feoffment to hold of him and his feme, this is void as to the feme, because she is a stranger to the estate. 17 E. 3. 79.]

See (C) pl. 7.

3. Rent, re-entry, condition, nor remainder, cannot be reserved nor appointed to a stranger; quod nota. Br. Conditions, pl. 83. cites 21 H. 7. 11.

4. No rent (which is properly a rent) can be reserved upon any feoffment, gift, or lease, but only to the feoffor, donor, or lessor, or to their heirs, and can no ways be reserved to a * stranger. Litt. S. 346.

* Per Periam J. Ow. 92. in the case of Bottenham

v. Harlakenden.—A rent so reserved upon a feoffment, &c. on condition of re-entry by feoffor and his heirs, is not a rent, but a sum in gross, and as a penalty, and if not paid, the feoffor may re-enter, and the rent or payment is gone for ever. Litt. S. 345.

D. 121. pl. 20. S. C.—*5. A bishop made a lease reserving the rent to the chapter during the vacancy by way of limitation; but held it ill. And. 9. Ayre Mo. 51 S. C.—Bendl. v. Ormes. 129.—Dal. 53. pl. 31.*

Ow. 92. S. C. by the name of Bottenham v. Harlackenden, the judges were divided. **[110]*** *6. A. devised to B. for years, remainder to M. for life, provided that B. should pay M. 20l. per ann. for rent. B. failed of payment, M. entered for condition broken. Anderson asked, why a man might not make a reservation on a devise? Periam J. answered, that he may to himself or his heirs, but this is to a stranger. Per Anderson, every devisee is * in the per by the devisor, quod fuit concessum. Why then shall not this be as a reservation to the devisor, and as a grant of the reversion to the wife? Adjournatur. Goldsb. 75. pl. 3. Hill. 30 Eliz. Bettenham v. Harlackenden.*

*Tis not a rent but a sum in gross, Lc. 269. *7. A rent reserved to a stranger, though in truth it is not a rent, yet it is a good reservation. Per Littleton. Noy 109. Mich. 2 Jac. C. B. in the case of Warner v. Agus. Ferrand v. Ramsay.*

8. The king made a lease of a house belonging to his housekeeper of Whitehall reserving a rent to the housekeeper for the time being, and it was held an ill reservation; for though the king may reserve rent to a stranger, yet such a reservation as this is ill, because he cannot reserve rent to such an officer, who is removeable at the will of the king. Ex relatione m'ri Not. Ld. Raym. Rep. 36. Hill. 6 & 7 Will. & Ma. Anon. cites Hill. 6 W. 3. B. R.

(E) Reservation. [Enure to whom. *Jointenants.*]

Palm. 841. Arg. cites 5 E. 4. 4.—*[1.] F 2 jointenants leases for years by parol, reserving a rent to one of them, this shall enure to both in respect of their estates. Co. Litt. 47.]*
So of a lease for life in respect of the joint reversion. Co. Litt. 214. 2.

[2. So if the lease be by deed poll, reserving rent to one of them, yet it shall go to both. Co. Litt. 47.]

Fol. 448. *[3. But otherwise it is if it be by indenture; for then it shall be good to the one by estoppel. Co. Litt. 47.]*

Br. Reservation, pl. 18. admits that such reservation upon their lease may be good.—Where 2 are seised, they may give reserving to one of them; for both gave. But where one had nothing before, it is otherwise. Br. Reservation, pl. 22. says it is so said elsewhere.—And Ibid. pl. 27. cites 5 E. 4. 4. Nota, That if 2 are seised, and lease for life, rendring rent to one of them, this is a reservation to both. But says quære inde; for it appears elsewhere that the reservation to the one shall be good.—Ibid. pl. 48. cites S. C. as a reservation upon a lease for years, and that both shall have the rent; but Brooke says, quære if it be law.

Sec (I) S. P. (F) How it may be. *Upon what Conveyance.*

This is by the saving in the statute of uses, *[1.] F A man bargains and sells land by deed indented and inrolled, according to the statute, a rent may be reserved thereupon; for though an use had only passed by the common law, yet*
now

now by the statute 27 H. 8. 10. the use and possession pass together. Mich. 39 and 40 El. between Wicks and Tillard adjudged. cited Co. Litt. 144.] 27 H. 8. where any one seized to the intent

that any may have a rent. Cro. E. 595. S. C. and say 'twas so held in Danby's case.—The use and possession pass tanquam uno statu. 2 Inst. 673. cites 2 Rep. 54. in Sir Hugh Cholmley's case.

So it is of a grant of a reversion or remainder, or any other conveyance of lands or tenements, whereby any estate passes. Co. Litt. 144. s. cites Mich. 39 and 40 Eliz. Wicked v. Tillard.

2. If tenant for life in quid juris clamat brought against him [111] surrender to the plaintiff, who has the reversion, by fine rendering rent by the same fine, this shall not be received; for a render of rent shall not be suffered upon surrender. Br. Reservation, pl. 42. cites 19 E. 3. and Fitzh. Surrender, 18.

3. Lord and tenant by certain services and 6l. rent; the lord brought writ of customs and services against the tenant, in which he released the services, reserving the 6l. and one mark more; and it is awarded a good reservation of the 6l. and the mark. But Brooke says, he believes that it is not law. Br. Reservation, pl. 21. cites 26 Aff. 37.

4. Belk. drew a fine that the baron and feme granted and rendered one messuage to J. S. which they held for term of life of the feme, rendering to them 8s. rent, with clause of distress, and it was refused; and after they granted and rendered as before, upon which J. S. granted again 8s. out of the land, and it was refused; quære causam: and after they granted and rendered to J. S. and released and quitted claim to him and his heirs for term of life of the feme, for which J. S. granted 8s. with clause of distress, and it was accepted. Br. Reservation, pl. 29. cites 39 E. 3. 1.

5. Coparceners upon partition may reserve rent and good. Br. Reservation, pl. 4. cites 45 E. 3. 20. S. P. But if one jointenant releases

to the other rendering rent, it is void. Arg. s Roll. Rep. 445. in the case of Eustace v. Scawen. —S. P. Arg. Ibid. 473. in S. C.

6. A fine was drawn, that the baron and feme granted and rendered the term to another baron and feme, and to the heirs of the baron, to hold of the chief lord, rendering to them and the heirs of the baron half a mark, with distress, &c. Finch. said, a man cannot charge land of which he is not seized, and the fine is executory, and not executed; contra upon acknowledgment of right, and where the fine is to a feme-covert rendering rent, she shall be examined before that the fine be taken. Br. Reservation, pl. 37. cites 46 E. 3. 15. Rent may be reserved upon a fine executory, but not upon a fine executed. Br. Reservation, pl. 6: cites 50 E. 8. 9.—Br. Fine, pl. 30. cites S. C.

7. Upon a release which * gives estate in the land, a man may reserve a rent. 10 E. 4. 3. b. As if one makes a lease for life,

and after releases to the lessee in fee or in tail, he may well reserve a rent upon such release; for by this release he has given the lessee a fee which he had not before. 10 E. 4. 3. b. Per Choke.—So on a grant of a reversion on a lease for years rent may be reserved; for the possession is in the grantor, and passes out of him. Per Needham. 10 E. 4. 8. b.

* S. P. Co. Litt. 193. b.—S. P. 13 Rep. 55. in Samme's case.—S. P. Per Choke and Needham. Br. Reservation, pl. 28. cites 10 E. 4. 3. But Brooke says it seems that then it shall be by deed.

As if dis-
seisee release
to disseisor
rendering

8. But upon a release or confirmation which enure by way of *mitter le droit*, a rent cannot be reserved, or an use limited. 13 Rep. 55. Sammes's case.

rent, and for default of payment to re-enter, this is void; for by this release, the disseisor has only the right of disseisee, for disseisor had fee-simple before. 10 E. 4. 3. b. Per Choke.—S. P. Co. Litt. 144. Et sic de similibus.—S. P. L. c. 148. cites 10 E. 4. 5 ——— S. P. Nor upon a release which enures by way of Extinguishment, a rent cannot be reserved. Co. Litt. 193. b.

But if be
confirms to
the tenant
reservand.
or tenend by
1d. pro om-
nibus servitiis;

9. If the lord confirms the estate of his tenant, *reddendo 1d. pro omnibus servitiis*; this extinguishes the first tenure; for *reddendo* does not make tenure, per Brian. *Quære* of the extinguishment. Br. Reservation, pl. 36. cites 21 E. 4. 62.

1d. pro omnibus servitiis; this is parcel of the ancient services, and the tenure remains. Ibid.

[112]

10. A. bargains and sells lands to B. by indenture, and before inrolment they both grant a rent charge by deed to C. and after the indenture is inrolled, some have said that the rent-charge is avoided; for (say they) it was the grant of A. and by inrolment it has relation to the delivery, which (say they) shall avoid the grant notwithstanding the confirmation of the other, which had nothing in the land at that time: but the grant is good, and after the inrolment, by the operation of the statute, it shall be the grant of B. and the confirmation of A. but if the deed had not been inrolled, it had been the grant of A. and the confirmation of B. and so *quacunque via data*, the grant is good. Co. Litt. 147. b.

Godb. 19.
pl. 25.
Pasch. 25
Eliz. C. B.
S. C. and S.
P. and that

11. A rent cannot be reserved upon a gift in *frank-marriage*, during the four degrees, but after the reservation is good, if there be attornment to the grantee. Ow. 26. 25 Eliz. Webb. v. Potter.

If the donee grants the reversion over, and the donee in frankmarriage attorn, now he shall pay the rent to the grantee; for per Littleton, he has lost the privilege of frankmarriage, viz. the acquittal; and no privity is between the grantee and the donees; per Periam J.

12. A rent, properly so called, may be reserved on a lease derived out of a power, and that remainder-man may distrain for it; so that it is a rent. Arg. 2 Jo. 35. Hill. 19 Car. 2. C. B. in case of Trustram v. Roper, cites And. 273. Harcourt v. Pool. and 1 Rep. 139. contra. And says that indeed it was Lord Coke's opinion, but was no part of the judgment.

Vent. 242.
S. C. ac-
cordingly,
and says it
was so ad-
judged in
this court in
MENLY'S
CASE, and
also in the
case of
PURCASS
v. OWEN,
23 Car. 2.—
R. ym. 222.

13. A. was tenant for life, and leased to B. for years; B. by parol assigned this term to A. rendering rent. It was insisted that this was a surrender, and so the reservation without deed void: but it was answered, that though it be not good as a rent, there being no reversion, yet it is good by way of contract, as a sum in gross. But per Hale, though this assignment, by operation of law, turns to a surrender, yet it is not an express surrender, and is good by way of contract; and therefore in debt brought for the rent, judgment was given for the plaintiff, by assent of the other justices, though all the days are not passed. 2 Lev. 80. Hill. 24 & 25 Car. 2. B. R. Winston v. Pinkney.

S. C. accordingly, that it is a duty by way of contract.—At the end of the case of Spatchur v. Minns, All. 58. Pasch. 24 Car. B. R. the reporter adds a note, that such contract is in the realty, and the debt arises in respect of the profits; and therefore it seems an action will lie before the last day,

say, and that so it was ruled 45 E. 3. 8. b. and admitted 14 H. 7. 2. b. And says that Hale told him that so was his opinion. — 2 Mod 175. Hill 28 & 29 Car. a. C. B. in case of Loyd v. Langford, where the lessee redemised to the lessor the same lands for the same term of years, reserving 20l. rent a year, *A the lessor died, and his wife entered as guardian to the heir of A. who was her son, and received the profits; and B. brought debt against her as executor de son tort, in the debt & detainet.* It was admitted by the defendant's counsel, that where the lessee makes an assignment of his whole term to a stranger, debt in such case will lie upon the contract, because an interest passes to him in reversion; and that as to this purpose a term is in esse by the contract of the parties, and that so it would here against the first lessor, who was lessee upon the redemise; but the redemise being a surrender, the heir of A. (A. being dead) is intitled to enter, and so may the guardian in his right. And here *debt lying only on the contract, the whole term being gone by the redemise, which is an absolute surrender, the plaintiff has no remedy at law; and so held all the Court; but told him he might seek for relief in Chancery, if he thought fit.*

A. and B. were possessed of a farm for 99 years, and assigned all their interest in the term to J. S. rendering 100l. a year rent. J. S. entered and paid the rent. A. and B. granted the rent to C. for the whole term, and J. S. attorned. Resolved, That this is a rent arising by real contract, and is reservable without deed, and that debt well lies for the assignee of it. Ld. Raym. Rep. 82. Trim. 8 W. 3. C. B. Brownlow v. Hewley. — In this last case, the Court principally relied on the case of *Winston v. Pinkney* above; and they said the opinion of Hale. All. 57, 58. has been held for law all these last years.

14. *A surrendered a copyhold to the use of B. and his heirs, upon condition that B. and his heirs should pay 5l. a year for ever to A. and his heirs, and for default of payment the use to B. and his heirs to be void, and to be to the use of A. and his heirs; B. was admitted; the land was sold several times, and the rent was also sold, and was conveyed by surrender and admittance on assigning the rent. Lord Chancellor decreed the rent and arrears to be paid.* 2 Vern. 16. pl. 10. Hill. 1686. Spindlar v. Wilford.

(G) How and in what Manner. *What shall be* [113]
said *Several Reservations of Several Rents.*

See Rent
(S) (G. a)

(U. a) pl. 4. Falstaff's case.

[1. **D.** 14 El. 309. 75. Winter's case, *lease of 3 manors, redendo for one 6l. for another 5l. and for the 3d 10l. with condition of re-entry into the whole for non-payment of any parcel.* By 3 against 1 those several reservations of the rents shall be several tenures, demises, reversions, and rents, and several avowries for them. Co. 5. Knight 55. this case is agreed.]

S. C. cited 2 Vern. 548.
— S. C. cited And. 174. pl. 211. in case of Knight v. Brech. —

S. C. cited 3 Le. 134. pl. 178. Arg. in case of Knight v. Beech. — *A. seised of Bl. Acre, Wb. Acre, and Gr. Acre, leases all 3 to J. S. for 90 years, rendering for Bl. Acre 3s. 4d. for Wb. Acre 10s. and for Gr. Acre 20s. quarterly, with clause of re-entry, if any part or parcel of the said rent be behind, &c.* W. R. purchased the reversion of Bl. Acre, and brought ejectment for 10d. for one quarter's rent, and had judgment; for these are several reservations and conditions; and a difference was taken between this and Winter's case, the rent in that being originally intire, whereas here it is originally several; and in that case the condition was, That if any part of the rent be behind, the lessor should re-enter into the whole. 4 Le. 187. pl. 292. Hill. 20 Eliz. Rou. 371. Hill's case.

[2. Co. 5. Knight 55. *Lease of 3 manors, rendering out of one manor 5l. out of the other 6l. for 10 years, and out of the 3d 10l. to commence 10 years after, one upon a condition precedent, and the other subsequent; those are several rents.* (But quære in the case of Winter above, whether this word (for) will make the rent several, as well as the words (out of the one manor.)]

[3. Co. 5. Knight 55. *one lease was made for years of diverse houses, rendering the annual rent of 5l. 10s. 11d. at the 4 feasts* S. C. and P. cited Hob. 172. in case
(that

of Stukeley (that is to say) for one only 3l. 11d. for another 20s. and for the
v. Butler.— others several rents, residue of the said 5l. 10s. 11d. with an intire
condition of re-entry into the whole, for nonpayment of any parcel;
Bulst. 256. and resolved that these are not several rents, because first the rent
Per Montague J. in was intire, and the * *videlicet* does not make any severance thereof,
case of Haverhill v. but declares of the several values of every parcel.]

Hare. —It was resolved, that the rent was intire. 1st, Because the lessor reserved the annual
rent (in the singular number) of 5l. 10s. 11d. and afterwards when the lessor comes to his condi-
tion for payment of the said rent, the condition is also in the singular number, viz. If the said rent
of 5l. 10s. 11d. be arrear in part or in all, so that this accords with the words of the indenture
(which import the intencion of the parties) that in this case it shall be one intire rent; and should
it be several rents then the question may be made of the validity of the condition, which extends to
the said rent, &c. in the singular number: and by such construction all the parts of the indenture are
consistent, and agree likewise with the law. And the difference between this case and WINTER's
case is, that there the reservations are several, but here (upon consideration of the whole indenture)
they are intire; quod nota bene 5 Rep. 55. b Mich. 30 & 31 Eliz. C. B. & S. C. —S. C.
argued 3 Le. 124. pl. 178 —Mo. 199. pl. 349. C. B. S. C. —And. 173. pl. 211. S. C. but in
none of these last books does the point above so clearly appear to have been resolved; and in And.
175. it is said not to tend to the end of the case, which depended upon the condition.—S. C. argued
Golds. 15. pl. 14.

In replevin, &c. the case upon the pleadings was, that the Archbishop of York made a lease of
a field, rendering 20l per Ann. rent (viz.) 40s. for one acre and 40s for another acre, and so for
several other parcels a several rent; adjudged, that these are several rents, for the (viz.) which im-
mediately follows the reservation of the rent, was placed there on purpose to divide the rents ac-
cording to the several parcels. Mo. 51, 52. pl. 152. Pasch. 5 Eliz. Eires's case. —Dal 54, 55.
pl 31. S. C. & P. —D. 221. b. pl. 20. Ayer v. Ome, S. C. but I do not observe S. P. —
Bendl. 129. pl. 191. S. C. but S. P. does not appear. —And. 9. pl. 19. S. C. but not S. P.

A lease was made of 3 manors, viz. D. E. and F. reserving for D. 5l. for E. 10l. and for F 10l.
per Ann. upon condition that if the said rents, or any of them, or any part, &c. were behind, the lessor
might re enter into all; and afterwards he sold the reversion of one of the said 3 manors to W. W. in
fee, and afterwards sold him the other 2 manors; the rent was in arrear for one manor, and thereupon
the vendee entered into all 3. Adjudged that his entry was not lawful; for though the words were
joint, yet the reservations and the rents were several. 4 Leon. 27. pl. 82. Sir Richard Lee v.
Arnold —Mo. 97. pl. 241. Trin. 14 Eliz. S. C. by the name of Appowel v. Monnoux.

* Cited per Trevor Ch. J. 3 Ch. R. 107.

[114] 4. A man granted a manor, and the multure of a mill, reddendo
for the manor 20s. and for the multure 10s. It was taken that
the intire rent is chargeable by distress upon the manor, because
distress cannot be in the multure. Per 2 Just. Mo. 201. pl. 349.
in Knight's case, cites 9 Aff. p. 24.

5. If two tenants in common lease upon condition rendering rent,
the law construes the grant, the condition, and the rent several.
Per Rhodes J. Mo. 202. pl. 349. in Knight's case.

6. And if lands are leased to an abbot and a secular man ren-
dering rent upon condition, the rent, reversion, and condition shall
be several, by reason of the several capacities of the lessees, per
Rhodes J. and admitted by Periam, as in the case of the lease by
two tenants in common, the cause of the severalty is inherent to
the estate of the grantors, and in this case to the capacities of the
grantees, which are paramount to the demise. Mo. 202. pl. 349.
in Knight's case.

2 Le. 150. 7. H. 8. being seised of the manor of Saffron Walden as parcel
pl. 184. 24 of the dutchy of Lancaster, in the 6th year of his reign, granted to
Eliz. in the the Guild of Walden (which was a fraternity of priests chanting
Exchequer. masses) 2 mills, 1 market, and the clerkship of the market in fee farm,
Ld. How- (which mills were parcel of, and the market by prescription appen-
ARDY. THE dant to, the manor) rendering 10l. per ann. rent to him and his
TOWN OF successors;
MALDEN,

successors; afterwards anno 31 of his reign, he granted the manor, and the rent and fee-farm to the Lord Audley in fee; this guild, being a chantry, was dissolved by the statute 1 Ed. 6. and their lands given to the king, and so both the mills and markets came again to him by that statute *salvo the rent to the Lord Audley*. Afterwards Ed. 6. reciting the grant of H. 8. and the dissolution, granted the mills, market, and clerkship, and also a fair to be held yearly, &c. to the corporation of Walden in fee-farm, rendering to him and his successors, *vel capitali domino feodi*, the yearly rent of 10l. only, and no more. Whereupon a charge was imposed upon them in the Exchequer, of 10l. a year. Upon a summons out of the Exchequer against the corporation for this rent, they pleaded that they had paid the yearly rent of 10l. to the heirs of the Lord Audley; to which plea the attorney general demurred. The question was, whether by the reservation in the grant of E. 6. the corporation should pay only one 10l. yearly to the Lord Audley, or 10l. yearly to the king, over and above the 10l. rent to the Lord Audley. It was argued, that both the said rents shall be paid; for the Lord Audley never was capitalis dominus, and so could not claim any benefit by the reddendum: besides, the Lord A. could have no benefit by this reservation, because the grant was in *fee-farm*, which words in themselves always imply a reservation of the value, or some profits to the king; and therefore it shall not extend to the Lord A. though he had been capitalis dominus; besides, the yearly rent of 10l. must go to the king, because he had granted to the corporation a fair which the guild had not before; and it is impossible that the Lord A. should be capitalis dominus of this fair, which was not in being before; and it is reasonable that the king should have some recompence for the fair, especially since the words of the grant are, *reddendo inde*, which shews that the rent must issue as well out of the fair as of the other things in the grant. And for these reasons it was adjudged the corporation should pay both rents. Mo. 159. pl. 301. Mich. 26 & 27 Eliz. The case of Saffron Walden.

S. C. argued, but adjournatur. — Ibid. 162. pl. 197. 24 Eliz. B. R. S. C. argued but adjournatur.

8. Tenant in tail of the manor of C. leased the *scite and demesnes* of the manor, and also all that manor of C. and all lands, &c. to the same belonging for 21 years rendering for the *scite* therewith letten, 3l. 6s. 8d. and rendering for the said manor and premisses therewith letten, 9l. 10s. Resolved by all the justices, that these are several reservations; and judgment for the plaintiff. Cro. E. 340. Mich. 36 & 37 Eliz. B. R. Tanfield v. Rogers and Watson.

Ow. 119. S. C. but this point does not appear.

(H) *How.* In what Cases a Reservation may be [115]
without Deed. In respect of the Estate granted.

[1.] If a man grants over all his estate he cannot reserve any rent without deed. 12 H. 4. 17. 9 H. 6. 43. b.]

Corody was granted by an abbot for

term of life, and the grantee grants it to the abbot again, rendering rent, and died, and the executors brought debt; and it was held, that it was a void reservation, unless it be by deed; because he parted with all his estate. Br. Reservation, pl. 8. cites 12 H. 4. 17.

Br. Reservation, pl. 8. cites S. C. See (F) pl. 13.

S. P. Br. Reservation, pl. 32. cites 26 Aff. 66. Per Rick. and Thorp.

[2. *As if a man makes a feoffment he cannot reserve any rent without deed.* 12 H. 4. 17.]

[3. *If lessee for life or years grants over all his estate he cannot reserve any rent without deed.* 12 H. 4. 17. 9 H. 6. 43. b.]

[4. *Where a man gives land with his daughter in frankmarriage, rendering 20s. rent, this reservation is void; for it is contrary to the nature of the tenure; for this tenure is to hold free till the fourth degree be past. Per Marten J. quod non negatur.* Br. Reservation, pl. 13. cites 4 H. 6. 28.]

See (F)

(I) In respect of the Conveyance.

[1. **W**HERE the conveyance enures by way of extinguishment a rent cannot be reserved without deed. 12 H. 4. 17. b.]

Fol. 449.

[2. *As a lessee cannot surrender, reserving rent without deed, because it enures by way of extinguishment.* 12 H. 4. 17. b.]

Lessee for 20 years surrenders rendering rent during the term; it was adjudged a good rent for so many years as the term might have continued. Godb. 146. pl. 183. 3 Jac. C. B. Warner's case.—Noy 109. S. C. by name of WARNER v. AGUS; and says, That the lessee may distrain for it; and that durante termino shall be construed for all the years.

Upon surrender of a lease by parol a reservation is good by way of contract, though without deed. Resolved. Vent. 248. Willson v. Pinkney.—2 Lev. 80. S. C.—Raym. 883. S. C. And MANLY's case is said, Vent. 242. to have been so adjudged in B. R. That tenant for years might assign his whole term by parol, rendering rent, and cites the case of PURCAS v. OWEN. 23 Car. But in the case of tenant for life a deed is necessary, ut ante. But it was doubted if an action would lie before the last day was past; but 2 Lev. 80. S. C. reports it lies before all the days are past.

Vent. 272. CARTWRIGHT v. PINKNEY, is, That rent may be reserved on a surrender, but says not whether by deed or without.

[3. A reservation is not good upon a release which enures by way of extinguishment. 12 H. 4. 17. b.]

(K) How it may be made. In what Cases without Deed, and in what not, and by what Deed.

S. P. Co. Litt. 169. a. [1. **A** RENT may be reserved upon a lease for years without deed. 40 E. 3. 34.]

Br. Reservation, pl. 26. cites S. C. but if he had granted

[2. *Lessee for 20 years may make a lease for 10 years, reserving a rent without deed; for he has a reversion, though it be but a chattle.* 2 E. 4. 11.]

over his whole term, the reservation without deed would not be good.—See (F) pl. 13.

[116]

For when the feoffee accepts the

[3. *If a feoffment be made by deed pall, reserving a rent, it is a good reservation.* Co. Litt. 143. b.]

deed and livery of the land, he agrees to the rent; and the rent is reserved by the words of the feoffor, and not by the grant of the feoffee. Co. Litt. S. 217, 243. b.

Br. Reservation, pl. 8. cites 12 H. 4. 17. That reservation on a feoffment in fee without deed is void, but contra by deed indented.

4. If

4. If rent be reserved without deed *for equality of partition*, or if rent be *assigned* to a feme *in name of dower*, those are good without deed. Br. Reservation, pl. 8. cites 12 H. 4. 17. Per Thirn. But though an exchange for lands in the same county may
 be without deed, yet a rent granted * *for equality of the same exchange* cannot be without deed. And the cause of the difference is apparent; for coparceners are in by descent, and are compellable to make partition. Co. Litt. 169. a. — * It was agreed, That upon a fee simple it cannot be without deed; but upon an estate for life or tail it may be reserved upon an exchange, by reason of the reverset. Br. Reservation, pl. 4. cites 45 E. 3. 20.

5. Upon a gift in tail or a lease for life a rent may be reserved without deed. Co. Litt. 225. b.]

(L) By what Words it may be made. Salvo [&c.]

[1. A MAN cannot reserve by this word (salvo) any services See (Q) *by which he himself or his mesne does not hold over.* Pl. 8, 9-26 Aff. 66.]

[2. As if a man holds by fealty only, and he gives in tail salvo 20s. See (Q) rent, this is not a good reservation of the rent. 26 Aff. 66.] Pl. 8, 9.

[3. But if the tenant holds by socage, and the mesne by knight-service, he may give in tail, reserving rent and salvo knight-service. See (Q) Pl. 8, 9-vice; for the land is charged with a foreign service, though the donor does not hold thereby. 26 Aff. 66. adjudged.]

[Other Words.]

[4. Reservand, reddendo, solvendo, faciendo, inveniando, dummodo, and such like are apt words to reserve a rent. Co. Litt. 47.] See Pl. C. 131. b. &c. the case of Browning v. Beekton.

5. If articles of agreement indented are made, sealed and delivered between A. and B. and the words are, *It is covenanted and agreed that A. doth lease* such land to B. for five years from the Michaelmas after, *provided that the lessee shall pay therefore at Michaelmas, and our Lady-day 100l. by even portions.* In as much as the first words are a present lease, the proviso shall be a present reservation of a rent, and not of a sum in gross. M. 38, 39. El. B. R. adjudged.] Per Curiam, this makes a reservation by the reason of the word yearly. Popham said, that it was a good reservation

also, omitting the word yearly, and that proviso it is covenanted, makes as well a covenant as a reservation. Noy. 57. Harrington v. Wife. — Mo. 459. pl. 638. Mich. 38 & 39 Eliz. S. C. ruled to be a reservation. — Cro. E. 486. pl. 2. S. C. And though there were not any words of agreement to pay it, nor any reservation, yet all the justices held it a good reservation, that being by articles, whereto either of them were parties, it is a good agreement, that the rent shall be paid annually during the term, which is tantamount as if it had been a reservation upon the lease by words of reservation. And adjudged for the plaintiff.

[6. If A. leases land to B. by indenture, and the words are, *In consideration of the payment of the rent herein after mentioned* he leases, &c. and after in the same indenture, B. covenants for him and his assigns with A. and his assigns to pay 10l. rent at certain feasts annually, [117] See Rent (P) pl. 2. in the notes there.

annually, &c. This shall be a rent, and not a sum in gross; for upon the whole indenture it shall be a reservation, and not a covenant; for the words (*In consideration of the rent hereafter mentioned*) makes it sufficiently clear. M. 12 Ja. B. R. between Athow and Heming adjudged.]

*See 35 H. 6 a. b. Pe Lit tleton, that it amounts to a red-dendum.

S. P. Br. Tenures, pl. 28. cites 26 Aff. 66.

7. It is to be known, that this word (*salvo*) shall be a good exception of such things which are in the possession of the feoffor, donor, &c. at the time of the feoffment, gift, &c. And also this word (*salvo*) gives a * new thing unto the feoffor, donor which was not in him before, &c. Perk. S. 645.

8. In avowry it was said for law, that by this word *salvo* in a deed, a man cannot save that which is in esse at this time, but if he will reserve a new rent or thing, it ought to have those words, *reddon' or solvend'*; quod nota, per Danby and others. Br. Reservation, pl. 2. cites 35 H. 6. 34.

9. There is a diversity between an exception, (which is ever of part of the thing granted, and of a thing in esse) for which exceptis, salvo, præter, and the like, be apt words; and a reservation, which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised. Poterit enim quis rem dare, & partem rei retinere, vel partem de pertinentiis, & illa pars quam retinet semper cum eo est & semper fuit. But out of a general, a part may be excepted, as out of a manor, an acre, ex verbo generali aliquid excipitur, and not a part of a certainty, as out of 20 acres, one. Co. Litt. 47. a.

See (L) pl. 6, 6.

(L. 2) What a Covenant, and what a Reservation.

Yelv. 42. & 47. S. C. accordingly.

1. **A** LEASE is made reserving 4l. per ann. but lessor covenants to allow 3s 4d. yearly, in consideration of bringing it to lessor's house. This is no alteration of the rent, and is no more than a covenant. Cro. J. 34. Trin. 2 Jac. B. R. Mason v. Chambers.

Jo. 231. pl. 2. S. C. adjudged, and says, that it was held accordingly. Mich. 37 & 38 Eliz. B. R. Rot. 226. in the case of Hayton v. Wife.

2. By articles indented between A. the testator and B. the defendant, it was covenanted, &c. and A. covenanted that B. should have and enjoy such a house and lands for six years, and that A. should repair the same: in consideration whereof, it was covenanted between them, and B. covenanted, &c. for himself; his heirs, executors and assigns to pay to A. his heirs, executors, and assigns the yearly rent of 90 pounds. B. entered, A. died, and his executor brought an action for the rent. It was insisted for him, that this was not a reservation, for then the rent would go to the heir, but it was merely a covenant to pay a sum in gross, and then the executor should have it, and that otherwise the words of covenant would be idle; besides the words being (*In consideration whereof he covenants*) refers to more than the covenant to enjoy the lands; adjudged a reservation of the rent, and that it shall follow the reservation, and go to the heir; for as the words covenant and grant that the lessee shall enjoy, &c. amount to a lease, and shall

shall bind the heir, so the same words of the lessee, that he will pay a yearly rent, amount to a reservation, and the rather because he covenants and grants to pay to him and his heirs. Cro. C. 207. pl. 1. Hill. 6 Car. B. R. Drake v. Munday.

* 3. A. leases to B. and C. his wife yielding 40l. per ann. rent, and B. covenants to pay a couple of capons more, or 6s. 8d. in money; this is no reservation, and doth not bind C. But if B. and C. had both covenanted to pay the capons, or if the lease had been to B. only, and he had covenanted to pay them, this covenant had amounted to a reservation; per Hale Ch. B. Hard. 326. Pasch. 15 Car. 2. in Scacc. Morris v. Antrobus.

4. In covenant upon a demise for years rendering rent, and breach assigned for non-payment, the defendant pleaded that part of the rent was to be allowed, &c. And per Cur. This is a covenant against a covenant; judgment pro quer' nisi, &c. Comb. 21. Trin. 2 Jac. 2. B. R. Burroughs and Hays.

(M) What shall be good ; in respect of the Uncertainty.

[1.] If a man leases for five years, proviso that the lessee shall pay for it at Michaelmas, and our Lady-day 100l. by even portions during the term; though the word (annually) is wanting there, yet this shall be taken to be annually during all the term, in as much as it is said, that it shall be * paid during the term. M. 38, 39 El. B. R. between Harrington and Wise adjudged.]

Mo. 459. pl. 638. S. C. accordingly. — See (1.) pl. 5.

* Fol. 450.

[2. If a man leases for years, rendering a certain rent at two usual feasts of the year, without expressing what feasts certainly, yet the law will say, that this shall be at those two feasts which are most usual for payments, scilicet, Michaelmas and Lady-day. M. 38, 39 El. B. R. between Harrington and Wise adjudged.]

[3. If a man leases land primo Maii, or at any other time, payable quarterly, it shall be intended quarterly from the making of the lease, and not at the usual feasts. P. 8 Ja. B. per Coke.]

[4. If a man devises 10l. rent out of certain land with clause of distress, payable quarterly to his steward of his manor of D. during his life; the devisee shall have but 10l. a year payable quarterly. M. 3 Ja. B. per Curiam.]

[5. If a man grants a rent of 20s. to another, payable at 2 feasts of the year naming them, and does not say by equal portions; yet this is good, and shall be so intended. 13 H. 4. Avowry, 240.]

6. Quolibet dimidio anni, and says not annuatim, yet good during the term. Palm. 482. Arg. in the case of Sury v. Cole, cites Pasch. 21 Jac. B. R. Hampson v. Brett.

Lat. 256. Arg. cites S. C.

7. Lease reserving his dwelling, his executors shall not have it; but otherwise, had it been during the term. Arg. Palm. 482. in the case of Sury v. Cole, cites 27 H. 8. 18, 19.

Lat. 256. cites S. C.

8. Demise at will paying after the rate of 18l. per ann. during the continuance of that demise. Per Cur. the reservation ad ratam

2 Vent. 272. S. C. accordingly. — 1 Salk. 162.

pl. s. S. C. that it is void for uncertainty.—Carth. 234. S. C. according-ly, and so a judgment in C. B. was reversed. Skin. 307. S. C. mentions no judgment, but that Holt seemed to think the reservation ill.

tenant on lease at will, where time of payment should be very certain is not good; for if the tenant hold over a day, he must pay the rent of the next quarter. But Dolben J. inclined that it being uncertain how long the tenant would continue possession, he being only tenant at will, this reservation might be good. Hill. 3 & 4 W. & M. B. R. 4 Mod. 76. Parker v. Harris.

[119] (M. 2) Good. Tho' no present Distress can be had.

1. **L**ORD, *mesne*, and *tenants* are, and the *mesne* grants the *mesnalty* in tail rendering rent: this is a good rent, and well reserved, though here be not a present distress. Yet it may be the *tenancy may escheat*, and then donor shall distress for all arrearages: and so the rent is payable by the possibility. Arg. Le. 59. cites 1 H. 4. E. 2, 3.

2. A man *leases for life*, and after grants a rent-charge to a stranger, this is a good grant to charge the reversion, but the grantee cannot distress the tenant for life in his life: nevertheless, it is said elsewhere, That after the death or surrender of the tenant for life, he may distress for all the arrears. Br. Grants, pl. 118. cites 5 H. 5. 8.

3. A. leases to B. for 20 years, and afterwards grants the reversion to C. rendering rent. Per Danby and Needham, if the beasts of C. come upon the land, A. may distress them for the arrears incurred; but per Moile A. can do nothing upon the land during the term, but if A. has once seisin of the rent he may have assize for arrears incurred after; but after the term ended, A. may distress for all the arrears, &c. 10 E. 4. 4.

(N) To whom it shall be said to be reserved, upon the Words.

S. P. Fin. Law, 8vo. 65. cites 27 H. 8. 19.—S. P. For it is part of the reversion; quod nota: Br. Conditions, pl. 7: cites 27 H. 8. 14, 15.—If it be reserved generally, and says not to whom, it shall go as well to the heir of the lessor as to the lessor himself, Per Gawdy J. Goldsb. 148. pl. 68: Hill. 43 Eliz. Anon.—Jo. 309. Mich. 8 Car. B. R. in the case of BLAND v. JUMAN, a doubt was moved, when a lease is made for years rendering *durante toto termino* a rent to the lessor, whether the reservation be determined by the death of the lessor, and resolved that it was.

[1.] If a man leases land for life or years, reserving rent during the term generally, without saying more, that is to say, To him and his heirs, yet the law will say, That this shall go to his heirs and assigns. Co. Litt. 47.]

[2.] If a man lease land for life or years reserving certain rent by the year to him, without saying to his heirs, his heir shall not have

S. P. Fin. Law, 8vo. 65. cites 27 H. 8. 19.—

have this after his death; for it shall be determined by his death. D. 45. a. pl. 21 E. 3. Affise 86. adjudged. Co. Litt. 47.]

an anonymous case. S. P. Palm, 488. in case of *Sury v. Cole*.—S. P. Per Gawdy J. Goldsb. 148. pl. 58. Anon.—S. P. Per Hale Ch. J. 2 Lev. 13. in the case of *Sacheverel v. Frogate*.—Kelw. 88. b. pl. 5. Hill. 22 H. 7. Anon. contra.

Lessee for 20 years leases for 10 years rendering rent *to him*. Adjudged that his executors shall have the rent, because he represents the person of the testator, cited by Coke Ch. J. Roll. Rep. 371. Pasch. 14 Jac. B. R. in the case of *Goff v. Haywood*, as resolved Pasch. 27 Eliz. in *Constable's* case.—S. C. cited per 3 J. Jo. 309. as adjudged 27 Eliz.

[3. If a man leases land for years reserving 20l. Rent [where he is seised in fee] *to him, his executors, and assigns*, without naming his heirs, the rent is determined by the death of the lessor; because his heir cannot have it, inasmuch as he is not named, and the executor, though he be named, yet he is a stranger to the reversion. H. 33 El. B. between *Richmond and Butcher* adjudged. The which intratur H. 33 El. Rot. 1316. Co. Litt. 47.]

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S. C. accordingly. Cro. E. 217. pl. 2. & ibid. 218. it is said they relied upon a book shewn to them in writing in

12 E. 2. where it was so adjudged.—And. 261. pl. 268. S. C. accordingly; and that the Lessor had * power to make the reservation as he pleased, and to continue the rent for all or part of the term only, and either absolutely or conditionally as he should express it; so that if he had reserved it for the first 2 years only. it should continue so long and no longer; and if he had reserved it to him during the term if he so long live, or had reserved it during the term, there if he dies the rent determines; but if he reserves an annual rent during the term, without saying to him, or to his heirs or assigns, yet it goes with the reversion, because it stands with the intent of him that reserved it, and nothing appears to the contrary; and they compared it to the cases of warranty, which might be made either to bind himself only, or himself and his heirs, or for the life of the grantee only.—Ow. 9. S. C. accordingly, and the same reasons mentioned as in And. 261. supra. and adds a diversity where the law makes a tenure, and where the party makes it; for in the first case the heir shall have the rent, but otherwise in the last case, unless there are express words for the heir, as in 10 E. 4. 19. by Moile if H. makes a gift in tail, and reserves no rent, yet shall the donee hold of the donor and his heirs, as the donor holds over; but if he make a lease for years, rendering rent to the lessor, the heir shall not have this rent, for it is a tenure made by the act of the party. So in the book of Affises, 86. If a man lets 2 acres of land rendering rent 10s. for one of them to himself by name, without naming his heirs, it is adjudged, That the heir shall not have the rent of this acre; and this is resembled to the case of 12 E. 2. where a man made a lease for years rendering rent to the lessor and his assigns, here none shall have the rent but the lessor, and it is void by his death, for his assignee cannot be privy to the reservation; and the words of the party shall not in any case be enlarged, unless there be great inconvenience to be avoided, and his intent and will is performed if he himself has the rent.—D. 180. b. Marg. pl. 50. cites S. C. accordingly.—2 Le. 214. pl. 271. Mich. 33 Eliz. C. B. reports, That it was held by the Court, that the rent should go to the heir notwithstanding the special reservation; because the words of the reservation are (during the term) and that the other words (to his executors and assigns) shall be void, and then the rent shall go with the reversion to the heir, and cited 27 H. 8. 19. by Audley.—Hale Ch. J. Vent. 162. in the case of *Sacheverel v. Frogate* cites the case of 27 H. 8. 19, and says the case of *Lane* [Latch it should be] 256. *Richmond v. Butcher*, and Cro. E. 217. went upon a mistaken ground, which was the MS. report of 12 E. 2. whereas he supposes the book intended was 11 E. 3. Fitzh. Affise, 86. For upon search of the MS. of E. 2. in Lincoln's-inn library, there is no such case in that year; but the case in 12 [11] E. 3. is, One seised of 2 acres leased one, reserving rent to him, and leased the other, reserving rent to him and his heirs; and resolved, That the first reservation should determine with his life; for the antithesis in the reservation makes a strong implication that he intended so.—S. C. cited by name of *Butcher and Richmond* Jo. 309. in the case of *Bland v. Inman*.

[4. If a man leases land reserving 20l. rent *to him and his assigns*, and dies, his heir shall not have this rent, nor the assignee of the heir, because the heir is not named. Mich. 5 Ja. B. adjudged upon demurrer, the which intratur Tr. 5. Ja. Rot. 3077. between *Wooton and Edwin*. Co. Litt. 47. There said to be in B. R.]

12 Rep. 382 S. C. but no judgment. —Lat. 274. S. C. adjudged.—S. C. cited.

Jo. 309. in the case of *Bland v. Inman*.—S. P. Per Hale Ch. J. 2 Lev. 13. in the case of *Sacheverel v. Frogate*.

5. If

Noy. 58. S. C. but S. P. does not appear. —Mo. 350. pl. 468. S. C. but not S. P. —Cro. E. 505. pl. 30. S. C. but not S. P.

[5. If the lord of a copyhold manor grants a copyhold, rendering certain rent *præfate domino* at a certain time, *et servitia debita & de jure consueta*. In this case his heirs after his death, and his assigns shall have the rent, it being reserved by a copy. P. 38 El. B. R. between Crisp and Frier adjudged.]

Jo. 308. S. C. adjudged for the plaintiff. —Godb. 448. pl. 516. S. C. says quære; for the judges differed much in their opinions. —Cro. C. 288. S. C. says that the judgment was affirmed. —S. C. * Fol. 451. cited Arg. 2 Saund. 368. 369. in the case of Sacheverel v. Froggat. —There is a diversity between a

[6. *A. possessed of a term for 100 years by deed indented, mentioned to be between him and B. his feme of the one part (but she never sealed the deed) A. and B. assigned the term to C. yielding, and paying during the term to A. and B. and the survivor of them, and to the assigns of the survivor of them 10s. rent per ann. upon condition, That if the rent be not paid it should be lawful for him and his feme, and the survivor of them, and the assigns of the survivor to re-enter, and after A. dies, his administrator nor B. the feme of A. shall not have the rent, nor enter for the condition broken; for the feme cannot have it, inasmuch as she did not seal the deed, and so the rent cannot be reserved to her being a stranger, and therefore as to her it is void, and the administrator of A. shall not have it as assignee of A. during the life of B. inasmuch as it was not intended as a limitation to determine by death of B. but to be reserved to B. herself, * and being void as to this, it shall not be extended to a limitation, and the condition in this case runs with the rent, and § therefore the rent being gone, the condition is gone also, and though the rent is reserved during the term, yet the other words (to A. and B. &c.) restrain it. Mich. 8 Car. B. R. between Band and Inman, adjudged upon special verdict by Richardson, Jones, and Croke. Contra Barkley. Intratur Hill. 7 Car. Rot. 550. But afterwards a writ of error was brought in the Exchequer-Chamber, and the parties agreed.]*

condition that requires a re-entry, and a limitation that ipso facto determines the estate without any entry: of the first no stranger shall take advantage; but in case of a limitation it is otherwise, as if a man make a lease quousque (that is to say) until J. S. come from Rome, the lessor grants the reversion over to a stranger, J. S. comes from Rome, the grantee shall take advantage of it and enter; because the estate by the express limitation was determined. So it is if a man makes a lease to a woman *quandiu casta viverit*; or if a man make a lease for life to a widow *si tam diu in pura viduitate viveret*. So it is if a man makes a lease for 100 years *if the lessee live so long*, the lessor grants over the reversion, the lessee dies, the grantee may enter. Co. Litt. 214. b.

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See pl. 3. and the notes there. —S. C. 3 Bull. 328. adjudged contra by Crew, Jonk. and Whitlock J. absente Doderidge, who had been of opinion that judgment ought to be given against the plaintiff. —Noy. 96. cites it as decreed in Chancery for the heir in the case of Winch v. Winch. —2 Lev. 13. Trin. 23 Car. 2. B. R. Sacheverel v. Frogat, S. P. where it is said, Arg. that the cases of Sury v. Cole and Sury v. Brown, were both adjudged that the rent should continue contrary to what is reported in Roll and Latch in those very cases: and per Hale Ch. J. the rent being reserved to him and his executors and assigns, it will continue after the lessor's death, and go to the heir by reason of the plain intent that it shall endure after the lessor's death, for otherwise it could not go to the executor, and this without the words (during the term). But otherwise where the rent is reserved to him, or to him and his assigns. And at another day after 2 arguments, judgment was given for the plaintiff. —S. C. accordingly. Vent. 148. 161. —2 Saund.

[7. If *A. seised in fee, leases for years reserving rent during the term to him, his executors, and assigns, and dies, the rent is gone; for his heir cannot have the rent, inasmuch as it is not reserved to him, but to the executors and assigns. Mich. 1 Car. B. R. between Shurey and Brown adjudged.]*

2 Saund. 370. S. C. accordingly, and says the roll of *Sury v. Browne* was produced in court. ———
 Freem. Rep. 16. Mich. 1671. *Sacheverel v. Walker* seems to be S. C.

8. A. tenant for life, remainder to A. for 12 years, remainder to the first son of A. in tail, with *power to A. to make leases not exceeding 99 years from the making*. A. makes a lease for 60 years rendering annually to the said A. during the term, and after his decease to such person and persons to whom the reversion or remainder of the premises should from time to time belong by the said limitation of the use, the sum of 3l. (being the ancient rent). It was agreed by the Court that the lease was good enough, and that it is a rent which is distrainable by those in the remainders, as they happen to be immediate to the lease. And. 273. pl. 282. Mich. 33 Eliz. *Harcourt v. Pole & Seles*.

9. A man makes a *feoffment in fee to the use of himself for life, the remainder to B. in fee, with a power to make leases for three lives, &c. rendering the ancient rent, &c.* who leases accordingly, and dies. Quære if B. in the remainder shall have the rent; and the better opinion was, That he should; but it was not adjudged. Noy. 110. *Harris v. Stephens*.

10. Rent reserved to the issue in tail only was held to be a good reservation, though the lessor himself was omitted. Arg. Hard. 90. cites M. 8 Jac. B. R. Per Fleming Ch. J. in *Sir James Skidmore's case*.

Cited by Parker J. and said, it was so adjudged in *Skidmore's case*. Ibid. 93.

11. A. makes feoffment to the use of himself for life, remainder to B. his son and heir apparent, and his heirs. A. & B. join in a lease for years, rendering rent to A. his heirs, and assigns. A. dies. Resolved, The reservation and rent is determined; for B. is not in as heir, and therefore cannot have the rent. Palm. 485. Mich. 3 Car. B. R. *Huntley's case*.

12. A. tenant for life to him and his heirs, assigns over his whole estate by lease and release to J. S. and his heirs, reserving 10l. a year rent to A. his executors, administrators, and assigns, with proviso for A. and his heirs to re-enter; and J. S. covenants to pay the rent to A. his executors and administrators. The Master of the Rolls held this a plain case, That here is no reversion to the assignor, and the rent is expressly reserved to the executor, and that the proviso for the heir to enter is not material, and that the heir is trustee for the executor. Wms's Rep. 555. Trin. 1719. *Jenison (Sir Matthew) v. Ld. Lexington*.

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 This cause came on afterwards by bill of interpleader before Ld. Chan. King, who said, that if the reservation were void yet the covenant must

be plainly good to pay the rent to the executors and administrators of A. But the Court inclined, that here being no reversion the rent might be well reserved to the executors during the 9 lives, and at length decreed it to the executors. Wms's Rep. 557. Trin. 1725. S. C.

(O) Out of what Thing the Rent reserved shall be said to be issuing.

S. C. cited Arg. 2. Saund. 303. in the case of the Dean and Chapter of Windsor v. Gover. —Where a barn and

[1. IF a parson leases certain land to another for years, with the tithes of the same land, reserving proinde a certain rent, this rent shall not be issuing out of the tithes, because there cannot be any distress there but only out of the land. Contra M. 15 Ja. B. R. between *Smith and Bowles. Per Curiam; (præter Doderidge, who seemed e contra) because he has an inheritance in the tithes.]

tithes are let together, though the rent be issuing out of the barn only in point of remedy, yet it is issuing out of the tithes also in point of render. Arg. Show. 51. cites Cro. J. 453. —Per Doderidge J. and Montague Ch. J. Cro. J. 453, 454. Dubbitt v. Curtees. See (B) pl. 5. and the notes there.

S. P. 5 Rep. 4. b. in Ld. Mountjoy's case.

2. If a rent-charge be granted out of a manor, nothing can be charged but the demesnes, and not the services. Br. Charge, pl. 19. cites 12 Aff. 40.

Lat. 99. — D. 212. pl. 38. Marg. cites Mich. 33 & 34 Eliz. B. R. Rot. 337. Emot's case. —Arg. 3 Bulst. 291. —Cro. E. 255. Emot v. Cole.

3. Lease of land and a stock of sheep. The rent issues out of the land only. D. 110. b. Marg. pl. 40.

D. 212. b. pl. 37. S. C. —Ben. 81. —Jenk. 196. pl. 3. —S. C. cited Arg. 3 Bulst. 291. —D. 361. b. pl. 15. S. P. —Per Popham Ch. J. Cro. E. 607. in case of Collins v. Harding.

4. Lease of a house and goods. The whole rent issues out of the house, and not out of the chattles. And. 4. pl. 9. Hill 2 Eliz. Rede v. Lawfe.

5. If land and the perquisites of a manor, or land and common, or land and an advowson, are demised together, rendering rent; the entire rent shall be issuing out of the land, notwithstanding any severance in the reddendum itself, or by any, viz. but if it be land which is demised, and part of the rent is referred to one part of the land, and the other part of the rent to the other part of the land, there they shall be several rents, because there is land, which is a thing chargeable by itself for each rent. Per 2 Just. Mo. 201. pl. 349. Pasch. 27 Eliz. in Knight's case.

2 Jo. 31. Arg. S. P.

[123] 6. If a manor has always been demised at 10l. rent, and after a tenancy escheats, yet this may be demised at 10l. and yet this cannot be said to be verus & antiquus redditus. But the act of God and the law do not prejudice any. 5 Rep. 6. Mich. 31 & 32 Eliz. B. R. Ld. Mountjoy's case.

See Heriot (D).

(P) By whom to be performed upon the Reservation.

Cro. C. 313, 314. pl. 5 Trin. 9 Chr. B. R.

[1. IF A. seised in fee, leases to B. habend. to B. his executors and assigns for 99 years, if B. C. or D. so long live, yielding therefore yearly during the term 10s. rent; and also yielding after the

the death of every of them, the said B. [C.] and D. his or their best beast for an heriot or * Farlive, or 50s. in lieu of every such best beast, at the election of A. his heirs or assigns; provided, that during the life of B. no heriot [shall be] by the death of C. or D. and after B. assigns this to F. and then B. dies; the best beast of F. the assignee, cannot be taken by election of A. the lessor, for an heriot upon the death of B. (though he might have distrained † upon the land for the best beast of B.) Tr. 9 Car. B. R. between Randall and Score. Intratur P. 8 Car. Rot. 422. Adjudged in writ of error upon judgment in hank thereupon. Adjudged so also upon demurrer, where the defendant in his avowry said, that the reservation was yielding after the death of B. his executors or assigns his or their best beast; and the plaintiff in replevin demanded oyer of the deed, and being entered, it was as before is alleged, and therefore a variance; for it shall be taken to be the best beast † of the [said] B. C. & D. respectively, and not of the assignee.]

S. C. accordingly. — * Quære if not (Fairleave) — † Cited a Lutw. 1867. and adjudged that the heriot may be seized in any place, in the case of Osborn v. Sture. — For the † words (his or their) shall not be carried farther than to the

persons named in the limitation. 3 Mod. Arg. 231. in the case of Osborn v. Steward cites S. C.

(Q.) What Things shall be said to be reserved, upon the Words.

[1. IF before the statute a man had aliened to hold of him by homage, fealty, escuage, and certain rent, pro omnibus servitiis, exactionibus & demandis he shall hold by knight service; for those words, pro omnibus servitiis, &c. do not exclude the service before-mentioned. 14 H. 4. 3. b.]

[2. If a man gives in tail tenendum de capitalibus dominis feodi, those * words being void, donee shall hold by the same services of the donor as he holds over. 4 H. 6. 20. Champernoun case, adjudged; for there the heir of the donee was in ward to the donor.]

* Fol. 452. Br. Tenure, pl. 21. cites S. C.

[3. If a man had aliened to hold by homage and rent. pro omnibus servitiis, exactionibus & demandis, those words exclude the lord to have a fine if he aliens, though it be a custom that the lord shall have a fine upon the alienation of the tenant. 14 H. 4. 3. b.]

[4. So those words will exclude the lord from having an heriot custom, though the custom be that the lord shall have heriot custom upon the death of every tenant. 14 H. 4. 7. b.]

[5. If a man gives land in tail to hold by escuage for all demands, yet he shall have of him knight service, ward and marriage; because this is incident to escuage. Kell. Incerti temporis 121.]

[6. If a man had aliened before the statute, to hold by a penny or other rent, pro omnibus servitiis exactionibus & demandis, yet he shall pay relief; for this is incident to the tenure. 14 H. 4. 8. Quære. Contra * 13 R. 2. Avowry 89. adjudged. Contra Kell. Incerti Temporis † 136.]

[124] Br. Tenures, pl. 76. cites S. C. That per judgment

For thereby the donee shall be discharged of homage and of relief; but the reporter says, that it is not law. But see Fitzh. Avowry, 99. Anno 19 E. 3. A man gave land, to hold by 10s. pro omnibus servitiis, exactionibus consuetud' et demandis, and yet the tenant was compelled to pay relief; for it is incident as well to chivalry as to socage; quod nota bene.

† See Tenure (7) pl. 6.

[7. So

[7. So if the *rent* be reserved for all services generally without other word, *relief* shall be paid; because it is an incident, and it is to be intended that he reserved the rent for all annual services, and not to discharge him of other profit of the seignior. 18 E. 3. 26. adjudged.]

[8. If a man who holds by foreign services gives the land in tail, *salvo forinfeco servitio*; the donee shall hold by the same services as donor held over. 26 Aff. 66. adjudged.]

Br. Tenures, pl. 28. cites S. C. lord, mesne and tenant were, and the tenant held of the mesne by socage, and the mesne

[9. If tenant holds by *socage*, and the mesne by knight service, and the tenant gives it in tail, reserving 10s. rent for all services *salvo forinfeco servitio*. This shall not create a tenure by knight service, but only by *socage*; for the salvo does not reserve any tenure but that which the donor holds over; for it cannot extend to the tenure, between the mesne and the lord paramount, without express mention of it, as it seems. Kell. Incerti Temporis 130. Contra 26 Aff. 66. adjudged.]

over of the lord in chivalry, and the tenant gave the land to J. and E. his daughter, rendering 12d. rent, *pro omnibus servitiis, salvo forinfeco servitio*, and after the donor granted the rent and services to S. in fee; the tenant attorned, and died, their heir within age, the grantee seized the heir and land for ward, and the heir brought assise, and per Rick. and Thorp, the reservation is not good of the rent; for frank-marriage shall be quit till the fourth degree be past; and per Wilby and Green, by this word, *salvo* nothing is reserved but that of which he is charged over; and per Wilby and Hill, notwithstanding the donor shall do no foreign services, yet the land was charged of the foreign service in the hands of the donor, by which the donor shall have it by the word *salvo*; and Wilby afterwards awarded that the plaintiff take nothing by his writ, contrary to the opinion of several, and therefore writ of error was thereof brought; and therefore it seems that he shall not be in ward; for per Rick. where the rent and service is granted, and not the reversion, nothing passes but rent-seck; for the services are incident to the reversion; for none can have services by such tenure, but he who has the reversion. Br. Reservation, pl. 32. cites 26 Aff. 66.

Br. Tenures, pl. 87. cites 19 E. 1. [2.] Fitzh. Avowry 224. S. P. per Herle, Wilby, Bowf. and Mutf. but several e contra.

[10. If a man gives land to a prior and convent *absque homagio & fidelitate habendum & tenendum* of him and his heirs, *reddendo inde sibi annuatim 10s. tantum pro homagio & fidelitate & pro omnibus quæ de dicta terra exigi poterunt, salvo tamen scutagio domini regis quando currit*; in this case, though he holds by service of chivalry, yet feoffor shall not have *homage* nor *fealty*, because of the express words of the deed. 19 E. 2. Avowry 224.]

[11. If at the common law the tenant had made a feoffment, *tenendum by frankalmoine* rendering 10s. rent, and saving to him foreign services; in this case the feoffee holds by the services expressed, and by the same services that the feoffor holds over; for so it is intended by the reservation of the foreign services. 30 E. 3. 24.]

[12. So if a man hath given land, *tenendum by the services of 8s. a year, salvo forinfeco servitio*, and the donor holds over by knight-service, the donee shall hold by knight-service. 31 Aff. 15. admitted 30. per Thorp.]

[125] Br. Tenures, pl. 30. cites S. C. says, that the best opinion

[13. So if a man hath given land, *tenendum by the services of 8s. a year, and grants further, that if the donee or his heirs relevariari debeant pro dimidia marca tantum releventur pro warda & maritagio & singulis exactionibus, salvo forinfeco servitio*; if the donor holds over by knight-service, the donee shall hold so likewise, though he

be discharged of ward and marriage by the said clause. 31 Ass. 15. Dubitatur. Contra Brook Tenure 30. in abridgment; but there quære.] was, that because relief is put in certain pro dimidia marca, that is socage, and not knight-service; for of socage relief shall be paid as well within age as of full age. Et adjournatur; quære.

[14. If a man has given land in fee, *to hold by a penny for all services, *salvo forinfeco servitio*, if he holds over by knight-service, the feoffee shall hold so by this reservation. 31 Ass. 30. per Thorpe.] * Fol. 453. Br. Tenures, pl. 31. cites S. C. and P. per Thorp; by reason of the salvo, &c.

[15. If a man has infeoffed another *to hold by a rose for all services, and doing for him to the lord paramount the services due to him*; if he holds by knights-service, the feoffee shall hold so likewise by this reservation. 31 Ass. 30. per Thorpe. 49 E. 3. Accompt 43. per Curiam + 49 E. 3. 10.] * Br. Tenures, pl. 31. cites S. C. per Thorp, but Mowbray contra: for the first words, pro omnibus servitiis, discharge him, and the last words are not sufficient to contradict the first: and Brooke says, the law seems to be with him; for the deed shall be taken more strong against the feoffor, and there is no reservation or exception of escuage. —† See pl. 18.

[16. If a man has infeoffed another *to hold by 6d. for all services*, and in the deed there is such further clause, *et ex illis 6 denariis scutagium solvi debet quando evenerit, quantum pertinet ad tertiam partem unius acrae terrae*; the feoffee shall hold by knight-service by this reservation; for by this it is not intended that the feoffee shall pay escuage certain. Dubitatur 31 Ass. 30.]

[17. So a fortiori, if a man had infeoffed another *to hold by 6d. for all services salvo scutagio*, the feoffee shall hold by knight-service. 31 Ass. 30. per Seton.]

[18. So if a man had given land to another *to hold by certain rent, pro omnibus servitiis & consuetudinibus, and doing for him to the chief lord the services due*; if he holds over by knight-service, the donee shall hold likewise by knight-service also. 25 E. 3. 46. b. admitted per Curiam. 49 E. 3. Accompt 43. per Curiam. *49 E. 3. 10.] * Br. Tenures, pl. 10. cites S. C. And per Persey, if the Lord Paramount, in this case,

releases to the mesne, to hold in socage, this shall alter the tenure of the tenant, so that now he shall hold only in socage, also by the words above, that is to say, faciend' capitali domino servitia debita, &c. quod Belk. omnino concessit. And per Persey, by the tenure above, faciendo servitia debita capitali domino, &c. he shall pay the rent to him, &c. for the mesne, but shall not do homage, fealty, &c. which are corporal services; for those shall be done by the mesne himself. Note the diversity.

[19. But if he holds over by socage, he shall hold so likewise. 49 E. 3. Accompt 43. per Curiam.]

[20. If before the statute a man had made a feoffment to a prior and his successors *to hold in pure and perpetual alms, without any other secular demand or human service, et dicti prior & successores sui tenentur invenire mihi, & haeredibus meis unum capellanum residentem in capella mea de B. divina celebrantem singulis diebus*, and obliges himself and his heirs to warranty, &c. whether this be a tenure in frankalmoigne, and the last clause only by way of covenant,

nant, or whether it be part of the tenure. Dubitatur 2 E. 3. 54. b.]

S. C. cited
Vent. 162.
—S. C.
cited by
Hale Ch. J.
Vent. 136.
as Cart-
wright's
case.

[21. If *A. and B. jointenants in fee by indenture which is sealed only by A. demises it for years, reserving 10s. rent to them; B. who sealed the lease, shall have but 5s. rent; for nothing passed from A. So that the lessee shall have only in lease the moiety of B. and it was not intended that the lessee should pay all the rent for a moiety of the land. Mich. 21 Car. B. R. between Bond and Cartwright. Adjudged upon a special verdict; for if B. had demised all and reserved 10s. rent, and a moiety had been afterwards evicted by A. the moiety of the rent should be apportioned.]*

22. If a man gives in *tail tenend' libere & quiete*, the remainder over in tail, to hold by 2s. he in the remainder shall render the 2s. and not the first estate, by the best opinion; contra if *libere & quiete* had not been in the first estate. Br. Reservation, pl. 43. cites 34 E. 3. & Fitzh. Avowry 258.

23. *Trespass* was brought *quare vi & armis clausum fregit & arbores succidit* by the lessor against the lessee for life where the great wood was reserved, and the writ awarded good; and therefore it seems that by reservation of the great wood the soil is reserved: and so said Tanks, and the others e contra. Br. Reservation, pl. 5. cites 46 E. 3. 22.

24. A man makes a gift in tail, reserving 2s. rent to himself during his life, and if he die, his heir within age, then reserving a rent of 20s. to his heirs for ever, he dies, having issue two daughters, the one of full age, and the other within age. In this case the donee shall hold by fealty only, inasmuch as the one daughter as well as the other is his heir, and both of them (as Littleton says) make but one heir: ergo, his heir is not within age, nor of full age. Co. Litt. 164.

3 Le. 114.
pl. 163. S.
C. in the
same words.

25. Before the statute of *quia emptores, &c.* a man made a feoffment in fee, to hold by the service of paying *post quamlibet alienationem sive vacationem*, the value of the annual profits of the lands. Per Cur. The value shall be intended such as was the value at the time of the feoffment made, and not as it is improved by succession of time. 2 Le. 117. pl. 158. Mich. 29 & 30 Eliz. C. B. March v. Jones.

(Q. 2) *Exception; What it is, and what amounts to it.*

1. **T**HE nature of an exception is to except and restrain part of the thing before-mentioned or granted, and not of a new thing of which no mention or grant was made before. D. 59. pl. 11. Pasch. 36 & 37 H. 8. *Wiltshire v. James.*

* 1 Salk.
196. Cole's
case.—Mo.
554. Per
Popham in
the case of

2. Exception is an agreement of the lessee sometimes, which shall charge him; but that is where he agrees on his part, that the lessor shall have a thing *dehors*, which he had not before: as if he lets land excepting a ** way or common*, or any other profit *apprender*, that

that is an agreement of the lessees, that he shall have the profit, Lady Ruffel Agreed Cro. E. 657. pl. 1. Pasch. 41 Eliz. B. R. Ruffel v. Gulwell. —But s. Brownl.

213. in the case of PROCTOR v. JOHNSON, it is said *arguendo*, that an exception is no agreement; for nothing shall be said an agreement but that which passes in interest.—Bullst. 2. S. C.—Admitted Arg. that an exception is an agreement. Le. 117. pl. 158. in the case of CAGE v. FAXLIN.

* (R) Exception. [Of] What [it may be.]

[1. **A**N exception is always of part of the thing granted, and of a thing in esse. Co. Litt. 47.]

2. It is to be known that these words (*exceptis & præter*) are always of such things which the feoffor, donor, grantor, lessor, releasor, or confirmor, have in possession at the time of the feoffment, gift, grant, lease, release, and confirmation; and therefore if a man seised of land leases the same land for life, *exceptis* 12d. or *præter* 12d. it is no good reservation, *causa patet*, &c. Perk. S. 639.

(S) By what Words. [Exception] may be. See (L)

[1. **E**XCEPTO, *salvo*, *præter*, and such like, are apt words to make an exception. Co. Litt. 47.]

(T) In what Cases it shall be said contrary to the Grant. See Dower (X) pl. 8.

[1. **O**UT of a general a part may be excepted, as out of a * S. P. or * manor, an acre: but not part of a certainty; as out of † 20 acres, one acre. Co. Litt. 47.] out of a close; for the grantee has a manor and a close, notwithstanding. D. 264. Marg. pl. 69. cites Trin. 3 Jac. C. B. Millar v. Pratt.—† S. P. For there the exception is of that which is expressly named before. Ibid.

[2. If a man grants *totam partem piscariæ suæ in such a place, salva sibi piscaria sua, &c.* this is a void saving; for it is contrary to the grant. 34 Aff. 11.] Fol. 454. Br. Reservation, pl. 23. cites S. C. Per Wich.—Arg. Lat. 269. cites 39 Aff. 11. Per Wich.

[3. If a man release to another all his right which he has in such land, except that which he has by descent from his father, where in truth he has not any right to the land but that which he has by descent from his father; this is a void exception, for it is directly contrary to the grant. 18 El. between Collins and adjudged. Cited M. 40, 41 El. B. R. See pl. 9.

[4. If a man leases a house, except a chamber, where in truth he has nothing in the house but the chamber, this is a good exception; for upon the deed, without averment of the matter in fact, it is clearly a good exception; and upon the truth of the matter it appears, Cro. E. 574. pl. 16. Trin. 39 Eliz. C. B. S. C. but not S. P.

pears, that his *intent* was not to lease this chamber, but only the residue of the house; and the exception is not directly contrary to the grant, inasmuch as *he does not therein lease the chamber by express name.* Contra M. 40, 41 El. B. R. between Willis and Stroud.]

[128]* [5. If a man leases to another *all his land in D. except Bl. Acre*, where he *has no land in D. besides Bl. Acre*, this is a void exception, * because it is directly contrary to the grant; for by this he grants his land, and this acre is all his land [which he has] and then the exception of this acre is an exception of all his land; Ergo. M. 41, 40 El. B. R. in Willis and Stroud's case, held.]

Cro. E. 574. pl. 16. S. C. but not S. P. Lord and tenant, the tenant is disseised, the disseisee purchases the seignior, and releases by deed or fine all his right in the land, saving to him his seignior; the seignior by such release is not extinct. But if in the same case the lord bath nothing in or out of the land, but only the seignior, and makes such release, saving his seignior, such saving is void; because the whole operation shall be restrained by the saving. Co. R. on Fines 7. cites 9 E. 3. 12 E. 4. College Lingfield's case.

Cro. E. 244. pl. 1. S. C. accordingly, and that the word (grossis) extends to boscia, [6. If the king leases the parsonage of D. with all the lands and underwood belonging thereto, (*exceptis omnibus grossis arboribus boscis & maeremiis*) This exception as to the underwood is void. M. 33, 34 El. B. R. between Keinsham and Reading, per Curiam. Cited Hobart's Reports 229. [170. pl. 125. in case of Stukeley v. Butler.]

arboribus, &c. and so nothing is excepted but grossis arboribus, grossis boscis, &c. and extends not to the underwoods; and that though this was in the queen's case, it made no difference.—Le. 247. pl. 334. S. C. and says, that in the letters patents there was a further proviso, that the lessee should have sufficient houseboot and bedgeboot; whereupon Fenner J. held, that this shews the queen's intent that the underwoods should not pass; and Wray said, if this word boscis in the exception should not extend to underwoods, it should be vain and signify nothing, which should be hard in the queen's case. [But no judgment is mentioned to be given.—S. C. cited by Hobart Ch. J. [as in the principal case, without any mention of such further proviso] that the Court held the exception void, and that it extended only to great woods.

* 170. pl. 125. in case of Stukeley v. Butler.— [7. If a man demise a house and shops (*except the shops*) this is a void exception. Hobart's Reports * 229. D. 9. El. 264. [b. pl. 40.]

A. and M. his wife, being tertenants for years of a house, leased the same by indenture to C. and all shops, cellars, follars, chambers, lights, entries, garden, yard, and all commodities to the said messuage appertaining, and also free ingress, &c. to the said premises, except and reserved to the said A. for his own proper use and occupation only, 2 chambers, one garret, 2 shops, one store-house parcel of the said house, to have to the said C. for 21 years; C. entered. A. retained the things excepted, and died possessed thereof; M. entered, and C. ousted her. Judgment in ejectment was given for M. because the exception is, as it were, absolute; for the words (for his own proper use and occupation only) are idle words, and void; and therefore not material. And. 52. pl. 129. Trin. 9 Eliz. Hornby v. Clifton.—Bendl. 181. pl. 225. S. C. accordingly.—Dy. 264 b. pl. 40. S. C. but Dyer held, that it appeared by express words, that the shops were leased generally, and this reservation or exception is only special and temporary, viz. during the occupation and use of A. himself, and is made to him by his name of A. only, without saying to his executors or assigns, &c. And says, nota, the exception of the shops is, of all the shops, which is merely contrary to the premises of the lease of them: and therefore is a void exception; and that so at length was the opinion of all the justices.—Show 313. Mich. 3 W. & M. Arg. cites the above case out of Dyer, in the case of CUDLIP v. RUNDLE. And Ibid. 316. the justices held the case of And. 52. above to be good law.

Cro. E. 393. S. C. but D. P.— [8. If A. seised of the manor of C. and of the manor of P. in the same county, and Black-acre is parcel of the manor of Cudworth, but lying near to the manor of Parkhall, and always occupied therewith, and reputed parcel thereof, makes a conveyance of the manor of P. and

and of all lands pertaining thereto, or reputed as parcel thereof, or occupied therewith as part or parcel thereof, and of all other his lands, except the manor of C. &c. In this case Black-acre is not excepted by the exception of the manor of C. For he cannot except a thing before conveyed by express terms. Tr. 8 Ja. between Arden and Darcy, per Curiam.]

Lane 69. S. C. & P. Trin. 7 Jac. in the Exchequer, says it was decreed in the time of

Baron Manwood, that it is excepted by the exception; but all the barons now thought it to be a strong case, that Black-acre is not excepted by the exception of the manor of Cudworth, and so the first decree was upon a mistake out of the law; and Tanfield Ch. Baron said, that the point is no other, but that I intcoff you of Black-acre parcel of the manor of D. except my manor of D. This does not except the thing by express terms; [but the reporter says] quære, if in this case there was any land occupied with Parkhall, which was not parcel of Cudworth, nor of Parkhall; for if so, then it seems that Black-acre * will be within the exception, in regard that the words, and lands occupied therewith, viz. Parkhall, are well satisfied.

*[129]

[9. If a man leases all his land in Lam. except the manor of D. and he has no land in Lam. besides this manor; this is a void exception. 18 El. B. R. between Cavel and Collins adjudged. Cited M. 13 Ja. B. See this case in Hobart's Reports 230.]

S. C. accordingly, because the exception goes to the whole thing

demised; otherwise of an exception of part. Cro. E. 6. Trin. 24 Eliz. C. B. Dorrel v. Collins. —S. C. cited Mo. 881. pl. 1236. in case of Stewkley v. Butler. —S. C. cited by Hobart Ch. J. Hob. 72. pl. 84. in case of Sherley v. Wood. —S. C. cited by Hobart Ch. J. Hob. 170. pl. 125. in case of Stukley v. Butler.

[10. If lessee for life leases for years, excepting the trees; this is a good exception, because he himself is punishable in an action of waste for his reversion. Tr. 7 Ja. Sir Allan Percie's case resolved.]

13 Rep. 60. S. C. accordingly, and that if the lessor himself cuts

them down, the lessee or assignee shall have trespass quare vi & armis, and shall recover damages according to his loss.

Upon demurrer it was resolved, where lessee for life makes a lease for years, excepting the wood, underwood, and trees growing upon the land, that it is a good exception, although he has not any interest in them but as lessor, because he remains always tenant, and is chargeable in waste; wherefore to prevent it, he may make the exception. But if lessee for years assigns over his term with such an exception, it is a void exception. Cro. J. 296. pl. 2. Hill. 9 Jac. B. R. Bacon v. Gyrling.

[11. If lessee for years of land, in which are trees growing, grants part of his term to a stranger, excepting the trees; this is a good exception, though he has nothing in the property of them, because he has a reversion of the land, and so waste lies against him by the lessor, and he himself shall have trespass for cutting of them, though he has no property in them. Tr. 7 Ja. in the Exchequer, Sir Allan Percie's case, in the court of Wards, resolved by the 3 chief justices.]

[12. [But] if lessee for years assigns all his term in the land, excepting the trees; this is void, because he has reserved nothing of the term in him. Tr. 7 Ja. in the Exchequer, in Sir Allan Percie's case, resolved by the 3 chief justices.]

If lessee for years assigns his term, excepting the timber-trees, or

clay, &c. the exception is void; for he can't except a thing which does not belong to him. 5 Rep. 12. b. in the 5th resolution in Saunder's case, cites it as adjudged Pasch. 28 Eliz. C. B. Foster & Myles v. Spencer & Bord. —Cro. E. 17. pl. 10. Pasch. 25 Eliz. C. B. S. C. by the name of Foster & al. v. Spooner & Aford; and at the end says, Nota 5 Rep. 12. cites it to be adjudged that the exception was void, and that waste lay against the assignee; but says, see Cokes Entries 695. the whole record of the case, but no judgment. —13 Rep. 60. in Sir Allan Percie's case, cites Sanders's case, and affirmed it for good law; for the assignment being of the whole term, he could not except trees, &c. which he had only as things annexed to the land, and so could not have them when he

departed

departed with all his interest; nor could he take them for reparations, or otherwise. But when lessee for life leases for years, excepting the timber-trees, they remain still annexed to the freehold.—Cro. E. 683. pl. 15. Trin. 41 Eliz. C. B. in case of Saunders v. Norwood, cites the said case of 28 Eliz. to have been adjudged.—S. C. cited by Doderidge J. 2 Bulst. 6. 8. In case of Billingsley v. Hersey, as adjudged.—Le. 48. pl. 62. Lewknor v. Ford, seems to be S. C. and Windham and Anderson held the exception merely void; but Rhodes and Periam J. held, that as to the fruits of the trees, shovellers, &c. such exception is good; but the book says, that the case was adjudged upon another point in the pleading, so as the matter in law came not to judgment.—4 Le. 165. pl. 269. Sir Richard Lewknor's case, S. C. Periam J. conceived such an exception might be good as to fruit-trees; the case was adjourned.—Ibid. 229. pl. 362. S. C. adjourned; but Periam J. thought that for apple trees, or other fruit-trees, exception would be good.—Godb. 114. pl. 126. S. C. accordingly.

So if tenant in tail after possession, grants his estate reserving trees, it is void; but if he lease for life, it is good. Per Jones. Lat. 270. Mich. 2 Car. in case of Sacheverel v. Dale.

[13. If lessee for years grants totum statum & interesse suum, reserving medietatem inde for his life; this is a void reservation, because repugnant. Tr. 2 Ja. B. agreed.]

The Court

resolved, 1st. That the exception of the moiety is repugnant and void. 2dly, That though the exception was only for life, yet it is void, because the grantee has not any certainty left to him, but only a possibility. Otherwise, * if the exception had been but for 2 or 3 years; and judgment was given accordingly. D. 264. Marg. pl. 19. cites Trin. 3 Jac. C. B. Miller v. Pratt.

[130]*

[14. So if a man grants to another all his term, saving that he himself will have it during his life; this is a void exception. Tr. 3 Ja. B. Per Warburton said to be so adjudged.]

15. Lease of land reserving the herbage, is void. Arg. Lat. 269. cites 33 H. 6. 28.

16. A lease was made by these words, totum manerium de A. cum suis pertinentiis, ut in domibus, terris arabilibus, pratis, pascuis, pasturis ad dictum manerium pertinen. seu spectant' (advocatione ecclesie ibidem, redd. assise, wardis, maritagis, releviis, escaetis, heriotis, perquisitis curie, boscis & aquis dicto manerio pertinen. except' & reservat') And the habend' in the deed was only, (dictum manerium, cum omnibus suis pertinentiis) without saying any thing de cæteris præmissis. Bromley held the exception of the advowson, lands, rents of assise void, and that all the services of the manor passed, inasmuch as it is part of the substance of the manor, and the lease is manerio spectant'. And he further argued that all the land which was in gross, besides the said manor, was comprised in the habendum per nomen manerii, &c. For it may be known per nomen manerii, &c. Dy. 96. b. pl. 63. Hill. 1 Mar. Clifford & Warner v. Moon.

17. If a man should bargain and sell all his land, except such as he should after devise; this is repugnant, because the grant is to take effect from the making the indenture; besides, such an exception undoeth the whole grant, or puts it in his power to revoke all; and is therefore void. Per Hobart Ch. J. Hob. 72. pl. 84. in case of Sherley v. Wood.

18. A lease was made of the manor of H. except the courts and perquisites of courts. Resolved that the exception was void as to the courts, but good as to the perquisites. Mo. 870. pl. 1208. Browne v. Goldsmith.

Hob. 108. pl. 131. S. C. Trin. 19 Jac. Rot. 607. It was agreed by the whole Court, that the exception of the courts, &c. was void; because the manor being granted by that name, could not be recalled; and a manor could not be without a court.—S. P. Per Coke, Dy. 96. b. pl. 43. Marg.—Lease of a manor, except court leets, is good, but not except court

court *baron*. D. 282. b. Marg. pl. 34. cites M. 8 Jac. B. R. *Serreg's case*.—And covenant that lessor shall hold courts, is void. Ibid. cites *Wheeler's case*.

The Lord North *demised a manor (excepting the court baron)* and perquisites, &c. The exception was found void in law, and the tenant Lady Dacre, would not make suit to the court kept by the Lord North; but the Lord Keeper Puckering, assisted with some judges, decreed her to make suit; for that it was plainly so intended. Cary's Rep. 25. Lord North v. Lady Dacre.

You may pare away as much of the demesnes, or *services*, or both, as you will, but you must leave it still a manor, having some *demesnes*, some *services*, and a court. This is, when what you have is a true manor, such as hath both demesnes and services; for though a manor may stand and pass by that name, that is but *titular*, yet your grant shall be taken as the thing is that you grant. Hob. 170. pl. 125. Hill. 12 Jac. Rot. 827. *Stukely v. Butler*.

19. But it was resolved that *in case of the king*, the exception would be good for the courts themselves. Mo. 870. pl. 1208. Hob. 108. pl. 181. S. C. and S. P. *Browne v. Goldsmith*.

20. Lease of a *parsonage*, excepting the *glebe*, is void. D. 264. b. Marg. pl. 40. cites Hill. 19 Jac. C. B. *Maydew v. Yeakley*.

21. A. in consideration of natural love, &c. and for the establishing a jointure to his wife *covenants to stand seised to the use of himself for life*, remainder to his wife for life, and after to his eldest son B. *in fee excepting all trees upon the land*: but that his wife shall have the *lopping and topping* of the trees. B. cuts 5 oaks upon the premises; B. cannot cut though he leaves sufficient for the wife, who may lop timber trees. Resolved Jo. 376. Hill. 11 Car. B. R. *Tregonel v. Rives*. Cro. C. 437. pl. 7. by the name of *Tregmiel & Ux. v. Reeve*, accordingly.

22. A. *infeoffs his son* of a manor upon marriage in tail except and reserving *Black and White-Acre to himself for life, habund' except before excepted to his son in tail*, &c. Question was, if the exception is void, and * if the words to himself for life are void. Upon the 2d argument, Keeling, Rainsford, and Morton inclined that the exception was not void, but that the words (to himself for life) are void, and the exception generally excepted Black and White-Acre out of the conveyance. But Twisden contra, held the exception was totally void. Lev. 287. Pasch. 22 Car. 2. B. R. *Wilson v. Armorer*. * [131] Vent. 78. Pasch. 22. Car. 2. B. R. adjournment.—Ibid. 87. Trin. 22. Car. 2. S. C. Three justices held the Exception good for the

whole fee; but Twisden held, that it was wholly void, because one sentence.—Ibid. 106. S. C. Mich. 22 Car. 2. says it was adjudged, that they did descend, either for that the exception was good; though the latter part of the sentence (viz.) for the life of the feoffor only, was void, and therefore to be rejected; or, if the whole exception was void, because one intire sentence, yet they all agreed that there was no use limited of those 2 closes which were intended to be excepted; for the use was limited of the manor exceptis præexceptis, which excluded the 2 acres; for although there were not sufficient words to except them, yet there was enough to declare the intention of the feoffor to be so.——Raym. 207. Mich. 22 Car. 2. B. R. S. C. says, that after argument at the bar several times, judgment was delivered by Mr. Justice Twisden in the name of the other judges, for the plaintiff, that the 2 closes did descend, wherein these points were proposed, 1. whether the exception of these 2 closes for his life only, be a good exception? and resolved a void exception, because contrary to the rules of law to have a livery operate in futuro, otherwise perhaps it had been if the exception had been for years only. 2. Whether in this case the exception be all good, or all void? and as to this point some of the judges differed. And judgment was given for the plaintiff, cites D. 264. b. pl. 40. 1 And. 52. pl. 129.

23. Grant of *advowson*, excepting the *presentation for life of the grantor* is wholly void. 3 Salk. 157. in the case of *Wilson v. Armorer*.

(U) *What shall be said to be excepted.*

By the exception, the soil itself is excepted.

Cro. J. 459. S. C. accordingly. — 3 Bull. 290. Pasch. 15 Jac. S. C. accordingly.

[1. IF a man leases land for life *except all great wood, scil. oak, ash, and crab-trees, and such like*; the soil is not excepted thereby, but only the trees, and so much as is sufficient to sustain the trees; for by the *scilicet* he has explained himself what woods he intends. P. and Tr. 15 Ja. B. R. between Smith and Bowles; this was a question but not resolved.]

If a man leases his manor except the woods and under-woods, by

[2. If a man leases a manor *except all woods and underwoods growing, or being upon the manor*, by this exception the soil itself is excepted; for the words (growing or being upon the manor) are but surplusage; for the law implies so much of itself. Co. 5. * Ives's case. 11. Resolved and adjudged.]

this the soil of the wood is excepted. Per Baldwin Ch. J. of C. B. Fitzh. J. and Knightley and Mart. serjeants. Contra Spil. and W. Conings. J. Br. Reservation, pl. 39. cites 33 H. 8. — S. P. And in a præcipe of the manor a foreprise ought to be made of so many acres of wood: but in such case, if I except *all my trees growing out of any wood, but upon land or pasture*, this does not except the soil, but thereby sufficient nutriment only is reserved out of the land to sustain the growth of the trees, and without which they cannot subsist: but if the lessor with lessee's licence grubs them up, then the lessee shall have the soil. 11 Rep. 49. b. in Lisford's case.

* Cro. E. 521. Mich. 38 & 39 Eliz. C. B. Ives v. Sams. S. C. — A. was seised of the manor of W. of which the frith-close was parcel, and demised the said manor to the defendant for years, excepting all woods and trees, &c. and covenanted with the lessee, that he might take hedge-boot and fire-boot super dicta præmissa; adjudged, that by the exception, the wood and soil of the frith-close was excepted, and the covenant to take fire-boot super præmissa prædicta shall be intended such things as were demised, and nothing more. Le. 116. pl. 158. Trin. 30 Eliz. B. R. Cage v. Paxlin. — But where one let a tenement, a close whereof was a wood, and commonly known by the name of a wood, and in the lease was an exception of *all saleable woods now growing, or which shall grow hereafter, which have been sold by the lord of the premises* with free entry, egress, and regress, for felling, making, and carrying off the same at all times convenient; and whether the soil of the wood was passed hereby, was the question, and resolved by all the justices clearly, that in this case the soil was not excepted, but passed to the lessee. Cro. J. 524. pl. 11. Hill, Jac. B. R. Pincomb v. Thomas.

[132] A difference was taken between the exception of wood and underwood, and the exception of timber trees, and that by the first, the soil is excluded, but not by the last, unless so much only as is sufficient for the vegetation

[3. If a man leases a manor *except woods, underwoods, coppice, and headgroves, which now be, or at any time hereafter shall be standing and growing in and upon the premises, with free ingress, egress, and regress* into the same, to cut and carry them away, so as the lessee leave sufficient fireboot, and all other boots, naming them in particular; and the lessee covenants to make the hedges of all the premises, except if the lessor shall make new coppices that the lessee shall not be bound to make hedges of them. By this exception the soil of 20 acres of coppice is excepted, though within the manor there are other trees growing *sparsim* upon the manor besides this coppice; for so the intent appears by the covenant, and the words (standing and growing, &c.) are not material, and by the reservation of ingress, egress, &c. is intended that he shall have ingress and egress into the manor to come at it. Tr. 16 Ja. B. R. between Whistler and Parslee. Adjudged upon a special verdict.]

and growing of the trees excepted, Cro. J. 487. Whistler v. Passow. — Poph. 146. S. C. accordingly, and by the reserving of a coppice the soil itself is reserved; for by Montague that which

is reserved is not demised: Croke J. agreed, and said, the difference was good between wood and trees; for by the excepting of wood the soil itself is excepted, otherwise of trees, and Haughton agreed that the soil itself is excepted in this case, and so it was adjudged. S. C. by name of Hide v. Whistler.——The land shall be said to be excepted as a servant to the trees *for their nourishment*, and not otherwise, so that if the lessor sells them, he has no farther to do with the land, but the lessee shall have it. Per Walmsley J. Godb. 117. pl. 136. in the case of Lewknor v. Ford.

By lease of a manor except *wood and underwood*, so much as is known by the name of wood, and so used, and the soil under it, is excepted; but if it be *wood not growing together*, but *beadgroves*, there the soil is not excepted, nor the *herbage*. Agreed by all the justices in C. B. Trin. 8 Eliz. Dal. 11.

[4. If a man grants all his piscary from such a place to such a place, &c. *Salvo stagno molendini sui* from such a place, which is between the places before-mentioned in the grant. By this saving, the piscary is not saved, but only the course of the water to the mill, and all necessary things thereto; for this appears to be the intent. 34 Ass. 11. adjudged.]

Br. Reservation, pl. 23. cites S. C. and says, that by long argument the plaintiff recovered

seisin of the piscary; for by this *salvo* nothing is reserved but the soil of the stream, the franktenement of it and the water to the mill to run, flow, and reflow to the mill, and by this the piscary in it is not reserved; for the grantee may have piscary there, though the lessor had the soil and the water. And so see that it is not like to the case in 14 H. 8. 1. of excepting the trees, the hems which breed therein are excepted.——And per Skipw. and Wich. if he had granted as above, *prater stagnum meum molindini mei*, by this the piscary is excepted and reserved. Ibid.

5. A man leased for years reserving the great trees, and therefore per Marten clearly, the lessee cannot cut the little branches growing upon the great trees, but Bab. contra, and took exception between exceptis & reservatis; but Marten said, that it was all one, and so is the case in anno 14 H. 8, infra. Br. Reservation, pl. 1. cites 3 H. 6. 45.

A lease was made of a manor except all manner of timber, trees, and great woods. The ques-

tion was, if a wood of 30 acres, part of the manor leased passed by those words so as the tenant shall have the underwood of it and the herbage. Per 3 justices he shall. D. 79. pl. 48. Hill. 6 & 7 E. 6. Anou.

An exception was of timber trees, saving that his wife may have and take the shrowds and loppings of them. In this case all the loppings are reserved, and the grantee may cut down and sell at her pleasure, and so the heir of the grantor cannot cut any trees. Cro. C. 437. pl. 7. Hill. 11 Car. B. R. Tregmiell v. Reeve.

Lessee for years, notwithstanding the trees are excepted, has liberty to take the shrowds and tops for fire-wood; but if he cuts any trees it shall be waste as well for the loppings as for the body of the tree. Per Hobert Ch. J. & tot. Cur. without question. Noy. 29. Ld. Rich. v. Makepeace.

6. A man leased his park, except woods and underwoods; and hems breed in the woods, and therefore the lessor shall have them; for by the excepting of the woods, all which breed in them is also excepted. Br. Reservation, pl. 30. cites 14 H. 8. 1.

S. P. And the lessor may come and take the fowls in the trees,

but the lessee shall have the soil and mines in it and quarry. Br. Exception, pl. 2. cites S. C.——And by the exception of the thing, as mines, quarry, &c. it is implied in the law that he may enter, and cut or dig; for he cannot otherwise come at the thing excepted. Ibid.——Br. Trespass, pl. 167. cites S. C.

7. So of the fruit of the wood, as acorns, crabs, &c. and the nests in them. Br. Reservation, pl. 30. cites 14 H. 8. 1.

[133] But the tenant shall

have conies, and partridges, &c. which do not come by reason of the wood. Br. Exception, pl. 2. cites S. C.

8. But

S.P. Br. Ex-
ception, pl.
31 cites S.C.
8. *But apple-trees* are not excepted by this term woods and
underwoods. Per Brudnel. Br. Reservation, pl. 30. cites 14
H. 8. 1.

S.P. Br. Ex-
ception, pl.
31. cites S.C.
9. *And by him by reservation of pond and wear*, the lessor shall
have the *fish and fowl* in it. Br. Reservation, pl. 30. cites 14
H. 8. 1.

S.P. *And by*
the excep-
tion he may
lawfully
come to take
10. *And by this reservation of the warren* he shall have the
beasts and fowl of the warren. Br. Reservation, pl. 30. cites
14 H. 8. 1.

show; for the law gives him a mean to come at the thing excepted; as exception of a staple, he
shall have free egress and regress to it. Br. Exception, pl. 2. cites S. C.

There is a
diversity be-
tween a gift
and an ex-
ception; for
if a man
gives his
wood, the
soil thereby
passes; but
where a
man leases a manor except the wood, the soil is not excepted per Brudnel. Br. Diffin, pl. 13.
cites 14 H. 8. 2.
11. A. leased his manor of D. for years, *reserving the wood and*
underwood. Shelley thought that by this reservation the soil and
land where the wood grew, were not reserved; but he agreed, that
if A. had made a *grant* of his wood, *and made livery*, the soil, where
the wood grew, had passed. But when it is not *reserved by the*
name of acres, it seems that the lessee shall have the profit of the
herbage, but that it was good to be advised upon this case till
another term. D. 19. pl. 110, 111. Trin. 28 H. 8. Anon.

12. Lease of a manor, *proviso that the lease shall not extend to*
Green-acre. Green-acre does not pass, but is excepted by those
words. And. 305. pl. 314. Mich. 36 & 37 Eliz. in Throg-
morton's case.

13. A lease is made of lands, excepting *timber-woods and under-*
woods; it was questioned whether trees growing *sparsum* in hedge-
rows and pastures, did pass; and difference was taken between
timber wood being *one* word, and timber woods being *several*
words, (though it be *arbor dum crescit, lignum dum crescere*
nescit) yet in common speech that is said timber, which is fit to
make timber. Then it was moved who should have the lops and
fruit of them, and the soil after the cutting of them down, and also
the soil after the underwoods; and as to that a difference was
taken, where the words are generally, *all woods*, and where they
are, *his woods* growing. Godb. 98. pl. 113. Mich. 28. 29.
El. C. B. Anon.

Now. 20.
Leigh's
case, S.C. ac-
cordingly.
—D. 264.
Marg. pl.
40. S. C.
cited ac-
cordingly.
14. A. leased to B. a rectory for years, *excepting the mansion-*
house of the rectory, *saving to the lessee the chamber* in question;
here is an *exception out of an exception*, which is good enough, and
shall make it pass by force of the lease; for this exception, or
saving the thing excepted, is as if it had never been let; so a
saving out of a saving makes it as if it had never been excepted, and
then it *passed* by force of the lease at first. Cro. E. 372. pl. 19.
Hill. 37 Eliz. B. R. Leigh v. Shaw.

Comb. 177.
S. C. and
that the
new house
was abso-
lutely ex-
15. A. by indenture *demised* to the defendant *a messuage or tenement*
called Ugbeare in Tavistock, together *with all* out-houses,
edifices and buildings, *except one house called the new house*, for the
use only of the plaintiff's father, and the plaintiff himself, and for
their

their wives and families to live in, if they please, but not to be let to any other person whatsoever, and at all times when they should not live there, to be used by the defendant, to have and to hold the premises before demised, (except as before excepted) to the defendant for 7 years, &c. Per Cur. the new house is excepted, and the defendant is tenant at will. Carth. 202, 203. Hill. 3 W. & M. B. R. Cudlip v. Rundle.

cepted.—
12 Mod. 29.
S.C. agreed,
that de-
fendant was
only tenant
at will, and
the new
house ex-
cepted.

cepted.—Show. 310. S. C. and held that the new house was excepted.—4 Mod. 9. S. C. says, the Court making some doubt upon the 1st argument, whether this was a tenancy at will by the subsequent words? one of the justices being of opinion, that the defendant could not be tenant at will, because the plaintiff must have been nonsuited if he had not proved a demise for 7 years; therefore time was taken to consider of it; and afterwards in Hilary Term 4 Will. Judgment was given that the defendant was tenant at will, and no more; that this could not be a lease for 7 years, because it was at the pleasure of the lessor when and how long the defendant should enjoy it; and therefore it was held, that the new house was absolutely excepted out of the demise, and it was such an exception which was not qualified by the subsequent words being fully excepted before.

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(W) Exception. In what Cases Things excepted in Leases, &c. shall pass by Grant, &c. of the Fee. *See Manes (Q. 2)*

1. **S**IR Simon Bennet devised all the coppices and wood-grounds, and all and singular the premises, and all woods and under-woods (except timber trees) to his wife for life, and after her death limited the same, with the timber trees, to trustees, that they for 2 years should pay the profits of the premises to the plaintiff, and they to bestow the same in building the college, and after limited the reversion and fee-simple of the premises to the plaintiff and their successors for ever (the said woods, underwoods, and timber-trees excepted.) Now the question is, as the exception is made of the woods, underwoods, and timber-trees, whether the soil is not excepted also from the plaintiff? This Court is clear of opinion, that the intent of Sir Simon was, that the whole, as well the soil as the said woods, underwoods, and timber trees, do pass by the said will. Chan. Rep. 134, 135. 15 Car. 1. Magdalen College in Oxford v. Crook.

(X) Exception. Reservation. In what Cases Exception or Reservation amounts to a Grant.

1. **D**ETINUE of charters, by which the father of the plaintiff, and J. N. being seised of 3 acres of land of D. in fee, leased to W. M. for life, the remainder to the father of the plaintiff by the deed in demand, and that W. M. is dead, and so the deed belongs to the plaintiff as heir; for his father is dead; and per Cur. the writ lies well. And so see, that it is admitted that the reservation of the entire remainder to the one, is good to him, where two were seised in fee; quod mirum! For the fee was never out of the other. But in reservation of rent by two upon their lease, reserving the rent to the one, this may be good; but contra of the fee-simple of the land. Quære: for it may be, that by this livery for life by the one

one the remainder to his companion, that it is a good gift of the moiety of his fee-simple to his companion. Br. Reservation, pl. 18. cites 38 H. 6. 24.

2. It was resolved upon evidence, in an action upon the 5 H. 6. of forcible entry, that if A. had made a *lease for years of Bl. Acre, and another of Wh. Acre*, and he *devises all his goods, plate, jewels* (except the lease of Bl. Acre) to J. S. that the lease of Wh. Acre passed by such a devise, because the intent appears by the exception. Noy. 112. Fitzwilliams v. Fitzwilliams.

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(Y) Exception good.

Or if a man
having a
term of two
houses for
certain
years,

1. **I**F a man *lease his houses, excepting his new house during the term*, his exception is good, but if he except it during his life, it is void. Per Holt Ch. J. 12 Mod. 15. Hill. 3 W. & M. Cudlip v. Randall.

grants his houses, excepting one of them for life, the exception is void; for his words (during life) qualify the exception, and shew his intent, that the one house shall not be excepted during the whole term, and so is void, which difference appears in Dyer 264. b. 12 Mod. 15. Cudlip v. Randall.

2. Where the exception does *not defeat the grant, nor is contrary to it*, it must stand. 12 Mod. 15. in case of Cudlip v. Randal, cites D. 264. b. and Hob. 70.

3. An exception *out of an exception*, puts the matter at large. 12 Mod. 15. in case of Cudlip v. Randall.

(Z) Exception. Good. *In respect of the Place where it is mentioned in the Deed.*

Litt. Rep.
63.

Jo. 376.
Tregonel
Reeve, S. C.
accord-
ingly.

1. **E**XCEPTIO *semper ultimo ponenda est*, is a rule. 9 Rep. 53. a. in Hickmot's case.

2. In a covenant to stand seised in fee was an *exception of timber-trees saving that the covenantor's wife should have the shrouds*, which was placed after the habendum. It was objected, that the exception of the trees after the limitation of the use, was void; for as an exception *after the estate limited*, is void; so after *an use settled*, an exception cannot be of the trees: sed non allocatur; for an exception may well be to shew his intent, that they should not be annexed to the estate for life. Cro. C. 437. pl. 7. Hill. 11 Car. B. R. Tregmiel & Ux. v. Reeve.

(A. a) Reservation. Good. *In respect of the Thing reserved.*

Br. Fine,
pl. 64. cites
24 E. 3. 64.

1. **A**FINE was levied rendering 20 quarters of barley for rent, with clause of distress, and admitted to be a good rent and a good reservation. Br. Reservation, pl. 12. cites 24 E. 3. 36.

2. If

2. If the *king* has a *corody* of a *priory*, by reason that he is *prior* of the *priory*, and he grants the *patronage*, without mentioning the *corody*, yet the *corody* shall pass, and if he upon the grant reserves the *corody*, yet this reservation is void; for none can sever it from the *patronage*; quod nota; and therefore it seems to be *incident* to it. Br. Reservation, pl. 31. cites 26 Aff. 53.

3. One may reserve by way of rent *decimam garbam*, or *quintam garbam*, or *medietatem granorum*. Arg. Mo. 485. pl. 685. in case of *Pigot v. Heron*, cites 44 E. 3. fo. . . .

4. The rent may as well be in delivery of *bens*, *capons*, *roses*, [136] *spurs*, *bows*, *shafts*, *horses*, *hawks*, *pepper*, *cummin*, *wheat*, or other profit that lies in render, office, attendance, and such like, as in payment of money; but a man upon his feoffment or conveyance can not reserve to him *parcel of the annual profits themselves*, as to reserve the *vesture* or *herbage* of the land, or the like; for that should be repugnant to the grant, non debet enim esse reservatio de proficuis ipsis, quia ea conceduntur, sed de redditu novo extra proficua. Co. Litt. 142. a.

5. Reservation of a *horse* or *ox* is a good reservation of rent. Mo. 59. pl. 167. Trin. 6 Eliz. Anon.

(B. a) Good. In respect of the Rent reserved. *Ancient Rent.*

1. IF a new house is erected on the premises, and no new rent is reserved upon it, because of the new house, but only the former rent, yet the rent is well enough reserved. Le. 148. pl. 205. Trin. 31 Eliz. B. R. Read v. Nash.

2. Power to make leases rendering antiquum redditum; he makes lease of *more land* by one acre than was before demised, and he reserves *more rent*, and the surplusage of the rent was more than the surplusage of the land was worth; yet the lease was adjudged void; because the authority was not pursued. Arg. in Ld. BUCKHURST'S CASE. Mo. 494. cites Shephard v. Blashall. * Lord Mountjoy's case. Mo. 197. pl. 348. Mich. 27 & 28 Eliz.—* 5 Rep. 3. b.

3. If there are *two coparceners*, one may demise her moiety rendering the *moiety* of the accustomable rent. 5 Rep. 6. in Ld. Mountjoy's case.

4. Rent reserved *quarterly* is now reserved *half yearly*, the lease is void; if *silver* instead of *gold*; per Ld. Keeper and Trevor Ch. J. 2 Vern. R. 544. in case of ORBY v. MOHUN, cites Mountjoy's case. 5 Rep. 5. b. (d)(e).—3 Ch. Rep. 138. S. C. cited per Cowper C.

—Adjudged a good reservation in case of a lease by dean and chapter; for it is for the successors benefit. Cro. J. 76. Bough v. Haynes.

5. If *two farms*, formerly let at 10*l.* rent *each*, are demised *both* at 20*l.* per ann. it is not good; per Ld. Keeper and Trevor Ch. J. 2 Vern. R. 544. in case of ORBY v. MOHUN, cites Ld. Mountjoy's case. 1 Rep. 139.—5 Rep. 5. b. Ld. Mountjoy's case.—S. C. cited

8 Mod. 250. in case of Baggot v. Oughton.—Mo. 494. cites Ld. MOUNTJOY'S CASE, by the name of Shephard v. Blashall.—Mo. 197. Ld. Mountjoy's case.—Sid. 101.—Cro.

Cro. C. 94. *Owen v. Thomas Appress*.——S. C. cited by Holt Ch. J. *G. Equ. Rep.* 64. Pasch. 4 Ann. in case of *Orby v. Mohun*.

*Cro. J. 76. 6. In a new lease *no. heriot was reserved*, as was in a former lease; yet good: Mo. 759. cites it adjudged Pasch. 43 Eliz. B. R. * *Baugh v. Heynes*.
pl. 6. S. C. & P. and mentioned in the same

year of Pasch. 43 Eliz. though placed there at Trin. 3 Jac. B. R.——6 Rep. 37. S. C. accordingly, by the name of the *dean and chapter of Worcester's case*. For it was not a thing annual, nor depending on the rent.——Noy. 110. S. P. in case of *BANKES v. BROWN*; because it is merely casual.

Noy. 110. 7. Land was always *demised by copy of Court roll* at 10s. rent, S. C. and now is *granted by lease at the same rent*, this shall be said the ancient accustomed rent. Mo. 759. pl. 1050. Pasch. 3 Jac. C. B. *Banks v. Brown*.

[137] 8. Demesnes of a manor were usually then demised, but the: Mo. 198, *copyhold and services* not; and notwithstanding this a lease was 399 pl. 348. made of all together, reserving the accustomed rent, and adjudged Mich. 28 & 29 Eliz. void. Cited Lev. 74. by Croke J. as the case of *Tanfield v. Fox*. B. R. S. P. adjudged in *Mountjoy's case*.——5 Rep. 3. b. S. C.

Jo. 110. 9. A. devisee of five acres for years, has *power to grant leases*, Trin. 30 reserving the ancient rent; A. lets the five acres *inter alia*, and Car. 2. B. R. reserves the ancient rent upon the whole; but it was said, S. C. says, that it being *reserving proinde* the rent of 6s. a year, and avers the ancient rent to be 6s. a year. Per Cur. it might be intended, that the *inter alia* objected, that the might comprehend nothing but such things out of which a rent ancient rent was not reserved, because the could be reserved, and then the rent reserved was reserved only for the five acres; however the *proinde* might be referred reasonably to the five acres only, and not to the *inter alia*; and that a distinct reservation of the ancient rent might be for the 5 acres; and so judgment was given for the plaintiff. Vent. 338. Pasch. 31 Car. 2. B. R. 339. Trin. 31 Car. 2. *How v. Whitfield*.

acres is reserved for the five acres, and the (*inter alia*) which were demised with them, and that the Court thought this a good exception; but that the defendant perceiving the opinion of the Court, as to [another point which was] the grand point, consented upon payment of costs, that judgment should be given for the plaintiff, and that so it was.——2 Show. 37. pl. 49. S. C. by name of *WHITFIELD v. How*, says, this exception was waived.

The case was, a settlement was made of lands and tithes, with 10. Lease of *tythes* was held good without reserving any rent, and yet the power was to reserve rent; cited per Holt Ch. J. 5 Mod. 382. in case of *WINTER v. LOVEDAY*, as the case of *Walker v. Webb*. 27 & 28 Car. 2.

power to make leases, *so that 5s. per acre be reserved* for every acre of the premises; a lease is made rendering 5s. per acre for the land, and nothing for the tithes, and held good. 2 Lev. 150. *Walker v. Wakeman*.——Vent. 294. S. C.——S. C. cited Arg. 8 Mod. 251. in case of *Baggot v. Oughton*.

G. Equ. 11. The *last rent before the creation of the power* is to be deemed the ancient rent; per Holt Ch. J. 2 Vern. 543. in the case of *Orby v. Ld. Mohun*.
Rep. 69. S. P. by Holt Ch. J. in S. C. cited Hard. 323.

12. Where

12. Where power is given to make leases of lands for 21 years, reserving the rents which were thereon reserved at the time of making the deed, in such case, the lands demisable by that power must be *lands then in lease, on which some rent was reserved.* *After the death of Pratt Ch. J. the case of Baggot v. Oughton was re-argued; and per tot. Cur. the lease of the mansion house and demesnes, on which no rent was reserved, was void, and decreed accordingly per Ld. Parker C. and affirmed in the House of Lords.* 8 Mod. 253. Baggot v. Oughton.—and cites Vaugh. 35. 8 Mod. 981.

(C. a) Good. In respect of *the Manner; and who shall have the Rent.*

1. IF a man leases his land for years by parol, reserving rent, and after makes thereof an indenture, without mentioning any rent; yet this is a good reservation. Br. Reservation, pl. 17. cites 21 H. 7. 37. Per Fineux Ch. J. *And if he leases his land for years by parol, and reserves no rent, and after makes indenture of this lease, and therein reserves rent; this is a good reservation, and so the reservation good in the one case, and the other, per Fineux; quære, and also, that where the lease is by parol, and after is made by indenture, if this be not a surrender; and quære, if it be not intended that the lease by parol is no other than a communication, when this is made after by indenture; et nota bene. Ibid.*

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2. It is holden in our books, that if a man makes a feoffment in fee, reserving a rent of 40s. to the feoffor for term of his life, and after his decease a pound of cummin to his heirs; that this is good. Co. Litt. 213. b.

3. A feoffment was made by A. to B. reserving a rent to A. and his heirs, habend' to B. and his heirs. Adjudged good enough, though placed before the habend' it being by indenture, and the law will marshal it according to the intent. Cited Arg. Cro. E. 345. as adjudged 22 Eliz. in the case of Hare v. Barton.

4. If lord of a copyhold manor grants a copyhold estate in fee, rendering to the said lord 20s. and doing services due, the heir shall have the rent. D. 45. Marg. pl. 1. cites P. 38 Eliz. B. R. *Crisp v. Frein.* Noy. 584. Crisp v. Fryer, is not S. P.—Mo. 350. pl. 468. S. C.

is not S. P.—Cro. E. 505. pl. 30. S. C. but not S. P.

5. Abbot and convent leased to M. for 120 years, rendering annually, during the term, to the said abbot and convent, or his successors, 8l. at Michaelmas and Lady-day by equal portions, &c. Resolved, that the reservation in the disjunctive is good, by reason of the first words (rendering annually during the term) and the words subsequent ought to have such interpretation as not to confound the precedent, but that all may be consistent and answer the intention of the parties; and that rendering rent annually during the term to one (and) his successors, and rendering rent during the term to one (or) his successors are all one; and the words (and) and (or) are words of explanation, viz. to direct the lessee whom it is good to

him for life, whom to pay the rent to during the term. 5 Rep. 111. b. 112. a. and void to his heir. Pasch. 43 Eliz. B. R. Mallory's case.

Co. Litt. 214. a. — 5 Rep. 112. a. in MALLORY'S case, S. P. for there want words precedent to direct the words in the disjunctive.

6. Lease to A. for 40 years to commence after the expiration of the term granted to B. and *under the same rent as is reserved in the demise to B. (who in truth had no demise)*; the term of 40 years shall commence immediately, but without any rent, because the reservation of such rent as was reserved in the demise to B. who had no demise, must be no reservation of rent. Per Vaughan Ch. J. Vaugh. 73. in the case of Row v. Huntington.

7. Lease was made to hold from Mich. 1661. to Mich. 1668. rendering *rent half-yearly*. There was a demurrer, supposing the words (to Mich. 1688.) made it not to be an entire half year, the day being to be excluded, and that it was so held in the case of HUMBLE v. FISHER. 1 Cro. 702. But per Cur. 'tis true *is pleading*, usq; tale festum will *exclude that day*; but in case of a *reservation* the construction is to be governed by the intent. Vent. 292. Hill. 27 & 28 Car. 2. B. R. Pigot v. Bridge.

8. A lease at will is made of 2 several estates; a reservation of the rent *secundum ratam* is a void reservation. 2 Vent. 272. Hill. 2 & 3. W. & M. C. B. Harris v. Parker.

It is void

because it would be a means to *multiply actions without number*: for lessor might bring an action of debt every hour, no certain time or day being appointed for payment. Carth. 235. Parker v. Harris. — Skin. 308. S. C. debated, and that Dolben J. thought the reservation good, but Holt Ch. J. e contra. — But this was in Hil. Term, and Carth. 235. when the judgment was given was in Mich. Term following.

* 5 Rep. 5. b. That it is not good. Ld. Mountjoy's case. — But Co. Litt. 44. b. is, that it is good. — This opinion in Co. Litt. so contrary to what he reports in 5 Rep. 5. b. in Ld. Mountjoy's case, is said to have been taken notice of and censured by the Master of the Rolls, 21 March, 1738, in the case of Colton v. Hoskins.

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Far. 97.
S. C.

9. Where *special days* of payment are *limited by the reddend'* the rent must be computed according to the reddend' and not according to the *habend'*, and the computation of the rent according to the habend' is only where the reddendum is general, viz. yielding and paying *quarterly* so much rent. 1 Salk. 141. Mich. 1 Ann. B. R. Tomkins v. Pincen.

(D. a) *Take. Who shall take by the Reservation, though not within the Words.*

1. IF my father leases land, rendering rent, and dies, I shall have the rent; for *the rent* and reversion is all one, and it is *parcel of the reversion*; and by grant of the reversion the rent shall pass. Per Paston and Cott. J. And yet it does not appear that the lessor reserved it to him and his heirs. Br. Reservation, pl. 15. cites 14 H. 6. 26.

2. Where a man *seised in fee* leases land for term of years, rendering rent, and does not say, to him and his heirs, yet *the heir shall have*

have the rent, by reason that the reversion is descended to him, and by grant of the reversion the rent shall pass; for it is in effect parcel of the reversion. Per Rede Ch. J. which Kingsmill J. took for a clear case. Br. Reservation, pl. 16. cites 21 H. 7. 25.

3. *Lessee for years grants his estate, and reserves a certain rent during the term to him and his heirs.* No judgment. Het. 76. Hill. 3 Car. C. B. The executors of Tomlin's case.

The executors shall have the rent, and may dis-

train for it, and not the heir. Cro. E. 644. Darrel v. Wilson.

4. *Tenant in tail makes a lease for years, rendering rent to him, his heirs and assigns, and dies without issue, and thereby the estate tail descends upon one that is not heir at law to the lessor, but heir only per formam doni.* This is a good lease, and shall go to the heir special, and not to the heir general. Hard. 89. Pasch. 1657. in Scacc. Cother v. Merrick.

(E. a) Who shall have the Rent, in respect of their Estate.

1. **R**ENT reserved to the lessor and his heirs shall go to the lord by escheat. Arg. Hard. 89. cites Litt. 348. & 3 Rep. 23.

2. *Bargainee by deed inrolled shall have the rent due after the bargain and sale executed, and before the inrollment.* Clayt. 29. Cockin v. Boswell.

Roll. Rep. 425. Arg. cites Ld. Hatton's

case.—2 Roll. 13. Arg. cites Barker's case.

3. A. seised in fee grants a lease for life to B.—A. afterwards levies a fine to the use of C. for 15 years, and after to the use of A. for life, with a power to make leases for 21 years, or 3 lives in possession. A. may grant a lease during the term for 15 years, but then C. the grantee for 15 years shall have the rent for so much of the term of the 21 years. Cro. J. 347. Pasch. 12 Jac. B. R. Fox v. Prickwood.

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2 Bull. 216.
S.C. but this point does not appear.

4. Baron makes a lease for years, rendering rent yearly during the life of baron and feme. The baron dies. The feme has frankbank by the custom, she shall recover the rent, and have it in frankbank. Palm. 282. in the case of Sury v. Cole. Arg. cites Pasch. 4 Jac. C. B. Rot. 112. Hill v. Hill.

Noy. 96. in the case of SURREY v. COLES, cites S. C.—S. C. cited Arg. Hard.

90. That the rent shall go to the wife who has the reversion.—Mo. 876. pl. 1225. Hills v. Hills, seems to be S. C. but mentions nothing of frankbank.—Lat. 265. in the case of Cole v. Sury. Arg. cites S. C. says, that Coke and Warburton held contra to the other three, that it should be determined.

(F. a) How much shall be said reserved.

See (M) pl. 4. 5.

1. **R**ESERVATION by tenants in common shall not make two rents; so that if the reservation be of 2s. and a pound of pepper, or a hawk, or a horse, there Littleton did not think that

If two tenants in common make a lease rent

dering rent, 10s. it shall be but 5s. to each of them. Yelv. 189. in case of *Smith v. Newlam*.
each of the tenants in common by their reservation should have 2s. and a pound of pepper, or 2 hawks, or 2 horses, &c. by reason of their several titles in common. Br. Reservation, pl. 44. cites Lib. Littleton, cap. Tenants in Common.

Yelv. 189. S. C. Mich. 8 Jac. but the one seems to be a transcript from the other.— Bull. 48. S. C. but somewhat differently stated, however the S. P. appears; and judgment was given accordingly for the defendant, *quod querens nil capiat per Billam*.
 2. The father made a lease of an house, &c. for 21 years, reserving the yearly rent of 30l. to be paid at Lady-day and Michaelmas, by equal portions, if he so long lived, and also yielding and paying after his death, to his heirs and assigns 20 marks *ad terminos prædictos*; but did not say, by equal portions: the heir brought an action of debt for 20 marks in arrear, for half a year's rent; and upon demurrer to the declaration, it was adjudged against him, because the words *ad terminos prædictos*, are only the time of payment of 20 marks, which are to be paid as the 30l. was; and though in the clause reserving the rent to the heirs, the words (*by equal portions*) were omitted, the law will supply them. Brownl. 108. Mich. 6. Jac. *Smith v. Newlam*.

3. A. lets a chamber and a closet in it to B. by parol, to hold as long as B. should please, paying yearly as much as it should be reasonably worth. A. brought debt for the rent, and averred that B. held from such a time to such a time, and that for that time it was reasonably worth so much; and judgment was given for the plaintiff, nisi. Sty. 397. Mich. 1653. *Famer v. Lawrence*.

[141] (G. a) How long it shall be said to be reserved.
 See (N) pl. 1. 6. By the Words. *Extent thereof*.

1. **W**HERE the reversion is granted for term of life, the remainder over to another, and the tertenant surrenders rendering rent, such reservation or render of the rent shall not extend but only to the first grantee for life of the reversion, and not to him in remainder of the reversion, who was party to the acceptance of the surrender. Br. Reservation, pl. 42. cites 19 E. 3. and Fitzh. Surrender, 8.

2. If a man leases land for life, the remainder over, rendering rent, and for default of payment to re-enter, it was agreed that the rent is reserved as well upon the remainder as upon the estate for life; and therefore it seems that the like is of the condition of re-entry. Br. Reservation, pl. 50. cites 29 Aff. 17.

S. P. If he in remainder agrees to the remainder after the death of the tenant for life. Br. Reservation, pl. 7. cites 50 E. 3. 22.—Br. Relation, pl. 32. cites 29 Aff. 17.
 3. If a lease for life be made to A. Remainder over to B. reserving rent; this rent extends to the remainder, as well as to the estate for life. Br. Done, &c. pl. 7. cites 50 E. 3. 21.

4. The

4. The baron made a lease for years rendering rent, during his life and the life of his wife. Adjudged that this is during the life of the survivor of them. Mo. 876. pl. 1225. Hills v. Hills.

(H. a) Determined. *Where by the Words of Reservation the Rent shall determine, though the Term continues.*

1. **I**F there is lord and tenant, and the tenant makes a lease for life, reserving rent to him and his assigns, and the lessor assigns over the reversion, and dies; the assignee shall not have a rent after his decease, because the rent determined by his death; for it was not reserved to him, his heirs and assigns. Co. Litt. 215. b.

2. If one jointenant makes a lease rendering rent, and dies, the survivor shall not have the rent, yet the lease is good. Arg. Roll. R. 442. Hill. 14 Jac. B. R. in case of Smallman v. Agburrough. S. P. Arg. Bridgm. 44. in S. C. cites D. 187. a. — S. P. Arg. Eliz. Dyer.

Mo. 139. pl. 281. in Shelly's case, cites 2

(I. a) Good. In respect of the Reservoir.

1. **A**N abbot granted a corody to J. S. for life rendering certain corporal services per ann. and after the grantee leased it again to the abbot for 12 years rendering rent; and a good reservation, per Brian, Choke and Littleton; for it is a good lease to the abbot by way of retainer; and therefore he shall render the rent; for he has quid pro quo. Br. Reservation, pl. 35. cites 20 E. 4. 12.

2. So if a man grants office of steward to one for term of life, and 10l. fee, a robe, and meat and drink, and the grantee leases it to the grantor for years rendering rent, the reservation is good, and the steward shall do the services during the years. Br. Reservation, pl. 35. cites 20 E. 4. 12. [142]

3. It was doubted if *cesty que use* makes a lease for years, or such like, rendering rent, if the reservation be good, unless the demise were by deed indented, by reason that he has no reversion; and then he cannot reserve rent, unless by deed, which is intended deed indented, as it seems; but it was not adjudged. Br. Reservation, pl. 45. cites 8 H. 7. 9. Br. Reservation, pl. 25. cites 5 H. 7. 5. that the reservation is void, unless it be by deed; for

he has no reversion, and the feoffor was a stranger to the lease. Per Brian. — Br. Ibid. pl. 16. cites 21 H. 7. 25. That the heir shall have the rent; per Rede Ch. J. which Kingmil J. denied; for though the statute of King R. warrants all feoffments, lease and release, and confirmation, yet it does not warrant any reservation; and if the reservation be good, it shall not go to the heir; but Rede contra; and because the statute warrants the lease, therefore it warrants all dependencies upon it, as reservation, &c. and by the use descended to the heir, he shall have the rent. But Brook says, nota, that no reversion of land is in *cesty que use*; therefore quære if this reservation be good.

4. The king released the services of his tenant, who held of him to pale his park, and reserved 4l. per ann. And it was said that it is a void reservation; for the king had nothing in the land at the time, &c. Br. Reservation, pl. 49. cites 10 H. 7. 23.

* This case is in no other book but All. 58. and that is a different point.

5. If lessee for years assigns all his term to come in his lease over to another, he cannot reserve a rent; for if he do, such reservation is not good, because the lessee hath no interest in the thing, by reason of which the rent reserved shall be paid; and where there is no reversion, there can be no distress. (Pasch. 24 Car. 1. B. R. 21 April 1648.) In the case of * LEACH AND DAVY, upon a trial at the bar; but it seems *debt will lie* upon it, *as on a contract*, if sealed by the assignee, and that upon the first default. L. P. R. 99.

For more of Reservation in general see Grant, Release, Rent, and other Proper Titles.

Residence.

(A) Non-Residence. Punishable by Statute. And what shall be said Non-Residence.

*[143]

Lord Coke tells us, 2 Inst. 627. That Cardinal Woolsey was a great protector of non-residents, and that he was no sooner

I. 21 H. 8. ENACTS, That every spiritual person promoted to any dignities, with any parsonage or vicarage, shall be personally resident, and abiding in, at, and upon his dignity or benefice, or at one of them. And in case such spiritual person keep not residence at one of his dignities or benefices, but absent himself wilfully one month together, or 2 months in one year, he shall forfeit 10l. the one half to the king, and the other half to the party that will sue.

attainted, but at the parliament holden in 21 H. 8 a law was made against non-residence, which was excellent for that time, but now had need of some alterations and additions.

* Note per Cur. upon this statute of non-residence, a vicar in a cathedral church is not any vicar in fact; and therefore if he has a benefice, cure, or dignity elsewhere, he ought to be resident there, in pain contained in the statute; for he ought to be resident upon one of his benefices, and such a vicar as above is not any such, &c. Contrary of a vicar of a church parochial, but prebend is a benefice; and therefore if he has another benefice, and is resident upon the prebend, this is sufficient to excuse him; for the statute is, that he shall be resident upon one, &c. And quære if a lay person, who is a prebend, ought to be resident; for the statute says, every spiritual person; and he is no spiritual person. Br. Action sur le Statute, pl. 2. cites 27 H. 8. 10.—Br. Surmise, pl. 24. cites 27 H. 8. 1. S. P. [but it seems misprinted for 27 H. 8. 10. pl. 24.]—Information upon the statute of non-residence was made against an infant of 14 years, who had taken a benefice by licence, and was not a chaplain, but had taken the order of St. Bennet; so that he might

might be married if he would. And by 3 of the justices, because he has taken a benefice he is a spiritual person, and within the power of the statute, which says, that every spiritual person beneficed shall be resident. Br. Surmise, pl. 24. cites 27 H. 8. 1.

In action grounded on this statute, the defendant *pleaded in bar, that he was and is a layman, and not a clergyman*; to which plea the plaintiff demurred. 1 Lutw. 138. cites a MS. of Warburton J. 36 H. 8. Chapman qui tam v. Gresham. And the serjeant observes that such presentation is not a meer nullity, but that he is parson de facto; and cites D. 292. b.

In an information upon the statute, &c. the defendant pleaded that he was *chosen gospeller of St. Paul's London*, and was resident there by reason of that dignity; it was argued, that this was not a dignity, to excuse the defendant, and the Civilians divided *spiritual functions into three degrees*. (viz.) 1st, A function which hath a jurisdiction, as a bishop, dean, &c. 2dly, A spiritual administration, with a cure, &c. As a parson of a church, &c. 3dly, Such as have neither cure nor jurisdiction, as prebendaries, chaplains, &c. and they defined a dignity to be *functio ecclesiastica cum jurisdictione vel potestate conjuncta*, and so exclude the two last degrees from being any dignity. And Popham and Clench (the other justices being absent) were of the same opinion, that it was not a dignity within the statute; but they would advise; & adjournatur. And afterwards the defendant compounded. Cro. E. 663. pl. 13. Pasch. 41 Eliz. B. R. Boughton v. Goufley. — 3 Nelf. Abr. 155. pl. 3. cites Cro. E. 665. BROUGHTON v. GOMERSLEY, and says, it was adjudged, but the book is as here.

The parson leased the parsonage house to one who lived in it, and kept hospitality there, but himself having taken a lease of the farm house of the manor within the parish, he dwelt there, and kept hospitality, and served the cure. After diverse arguments at the bar, the justices were divided in opinion whether this was non-residence; Popham and Gawdy held that it was not a residence; but Clench and Fenner e contra & sic pender. Mo. 540. pl. 712. Mich. 32 & 40 Eliz. Goodale v. Butler. — Cro. E. 590. pl. 28. S. C. and Gawdy and Popham held, that it was not a residence according to the statute, which was made for 3 causes. 1st, That the cure should be served. 2dly, That the poor should be fed. 3dly, That the parsonage-house should be upholden and maintained, which last cannot be, if the incumbent does not inhabit it. And if the statute should be otherwise construed, many inconveniencies would ensue; for parsons would purchase other houses within their parishes, and be always resident upon them, and suffer their parsonage-houses to decay, and sterilitate their glebe land, and meliorate their own possessions in prejudice of their successors. And as Gawdy said, the statute which says, that he shall be resident upon the benefice, shall be intended *where there can be a residency*; for he cannot be resident upon the tithes, nor upon the glebe-land, where there is not any house; but only his habitation is within his parsonage house. Clench and Fenner e contra; for they held, that if he be resident within his benefice (which extends to the whole parish) it is sufficient; but if he be resident upon any other house adjoining to his parish, but not within his parish, although he every Sunday and holiday serve the cure, yet it is not sufficient, as it was adjudged here in BROWN AND HUDSON's case. 33 Eliz. And they said, that the intent of the statute for his residency is, *that he should pascere gregem cibo, exemplo & verbo*; all which he may do when he is resident in any part of the parish; and the statute is in the disjunctive, viz. *in, at, or upon his benefice*. Et in disjunctivis sufficit unum esse verum. And it is clear, that all the parish is his benefice; so he is resident in his benefice; but peradventure he is not resident upon his benefice, unless he inhabits within the parsonage-house. (But note, the statute is in the copulative, *in, at, and upon his benefice*.) The statute also cannot intend residency upon the parsonage-house; for there be divers parsonages which have not any parsonage house; but it may be aliened by the former parson with the consent of his patron and ordinary, or let out, so as his successor cannot have it; and therefore his residency may be in any other house within the parish. Wherefore, &c. And Fenner said, that the Lord Anderson was clear of his opinion, that it is a sufficient residence, if he inhabits within any part of the parish. Et adjournatur. — Goldsb. 169. S. C. adjournatur. — 6 Rep. 21. b. S. C. adjudged that he must dwell in the parsonage-house, and not in another house, though in the same parish; for the statute intends not only serving the cure, but likewise *maintaining the houses* for his successors, as well as for himself, that they also may keep hospitality there.

The parson dwelt in the town, which was his rectory, in a house of his own, and kept the parsonage-house in his own hands, and furnished with his own goods, without letting the house to any person. The question was, whether the parson had hereby incurred the penalty of the statute 21 H. 8. 13. This case was compounded by the Lord Coke, but he intended this was no residence within the statute. 2 Brownl. 54, 55. Hill. 8 Jac. 1610. C. B. Canning v. Dr. Newman.

This statute is a general law, and therefore need not be pleaded, nor any part thereof. Cro. E. 601. pl. 11. Mich. 39 & 40 Eliz. B. R. in case of Armiger v. Holland. — S. P. [144]* Brownl. 208. Mich. 5 Jac. in case of Jennings v. Haithwait.

Watf. Comp. Inc. 8vo. 685. c. 37. says, he conceives, that although by the statute of the 21 H. 8. c. 13. there is no express provision made to excuse any person from being resident upon any of his benefices, by having been a chaplain to any person, after his attendance is determined, nor to excuse other persons enabled thereby to hold more than one benefice by dispensation. yet he that is duly qualified and dispensed with to hold more than one benefice, if he be duly resident upon any one of his dignities, or * benefices with cure, is not punishable by the said act; because this act doth only require, that he shall be resident in, at, and upon his dignity, or benefice, or at one of them at the least; such interpretation is to be made of that act as shall make the same practicable,

that is, that the liberty and benefit given thereby to persons qualified by birth, degree, or service, for holding more than one benefice, may be enjoyed, which is impossible, by reason of the same act, persons having more benefices than one be restrained from being absent from any one of them by the space of 1 month together, or by the space of 2 months to be accounted at several times in any one year. And he supposes, that if a pluralist, though duly resident upon one of his benefices, be punishable by this act, for not being resident upon his other, that a non obstante had of the king will not save him from the penalty thereof, because all licenses and dispensations to be non-resident, contrary to the said act, are thereby made void, and of none effect, with a provision, that it shall be lawful for the king to give licenses to every of his own chaplains to be non-resident, but no provision for his licensing of others. And it is also enacted by the stat. of 1 W. & M. Sess. 2. cap. 2. declaring the rights and liberties of the subject, &c. "That no dispensation by non obstante of, or to, any statute, or any part thereof, shall be allowed, but that the same shall be held void and of none effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of parliament; and it is also declared, that the pretended power of suspending laws, or the execution of laws by regal authority, without consent of parliament is illegal." But the doctor conceives, that if any person, having more than one benefice (especially with cure) by sufficient dispensation be punishable (being resident upon one of them) for not being also resident upon his other, he is *only punishable in the Ecclesiastical Court, and as an offender against the ecclesiastical law, and not against the aforesaid statute of 21 H. 8.* and that chiefly by reason of the usual proviso in the *archbishop's dispensation to hold 2 benefices with cure*, which he there recites. It may be a question, *Whether bishops, for their being not resident upon their bishopricks, are punishable by the statute of 21 H. 8. cap. 13.* and he conceived that they are *not punishable thereby*, for that the said statute enjoins residence to persons promoted to any archdeaconry, deanry, or other dignity in any cathedral church; which other dignity is to be construed to extend only to dignities of like or inferior nature, and not to bishopricks which are of a superior nature. But though an archbishop or bishop be not tied to be resident upon his bishoprick by the statute of 21 H. 8. yet they are thereto obliged by the *ecclesiastical law*, and may be compelled to keep residence by *ecclesiastical censures*. And if a bishop hold in *commendam* an archdeaconry, deanry, or like inferior dignity, parsonage or vicarage, with his bishoprick, he is punishable by the said statute, if according to the same he be not resident upon such dignity, parsonage, or vicarage, and that though he be constantly resident upon his bishoprick, he shall not be excused thereby.

[One would think it might be justly wondered at, that in a Christian country there should be any occasion of human laws to enforce residence of clergymen, who have so solemnly taken upon them the charge and care of the souls of their flock, and of which so strict an account will one day be required of them. Non-residence, unless in very few particular cases, seems utterly inconsistent with their solemn engagements, and the duties required of them by our most holy religion; and it may be worth the consideration of many persons, who obtain dispensations upon principles of interest and worldly advantages, how far they will be allowed to justify under them at that great day of account. The damnable and damned events of this neglect, as my Lord Coke 2 Inst. 626, calls them, are more and more observable almost every day, as they contribute to the dreadful increase of infidelity and atheism, which, there is too great reason to fear, will (if not timely repressed of) bring down severe judgments upon us]

S. 27. If any person obtain at Rome or elsewhere any dispensation to be non-resident contrary to this act, every such person, putting in execution any such dispensation for himself, shall incur the penalty of 20l. to be forfeited and recovered as aboveaid, and such dispensation to be void.

2. 33 H. 8. cap. 28. S. 2. Enacts, That the chancellor of the dutchy of Lancaster, and general surveyors of the king's lands, the treasurer of the king's chamber, and the groom of the stole, may retain in his house, or attendant unto his person, one chaplain, having one benefice with cure, which may be non-resident.

S. 3. Provided, That the chaplain shall repair 2 times in every year to his cure, and there tarry 8 days at least to visit and instruct his cure upon pain to forfeit for every time failing 40s. the one moiety to the king, and the other to such as will sue for the same.

3. 18 Eliz. 11. S. 7. After complaint and sentence the ordinary within 2 months of the sentence, upon request of one or more churchwardens, shall grant a sequestration thereof to one or more inhabitant: and upon default in the ordinary every parishioner may retain

tain his tithes, and the church-wardens may take the profits of the glebe, &c. to be employed to the poor's use till sequestration committed, and then to account to such sequestrators who are to employ such profits according to 13 Eliz. 20.

* 4. In the statute 1 W. & M. Sess. 1. cap. 27. which disables Popish recusants to present to benefices, and gives the presentation to the universities, there is a proviso, that if any person so presented or nominated to any benefice, with cure, shall be absent from the same above the space of 60 days, that in such case the said benefice shall become void.

5. It is a quære if a parson may demise all his living, because it may amount to non-residence. Per Holt Ch. J. 12 Mod. 236. Mich. 10 W. 3. Anon.

(B) The Effect of Non-Residence as to Leases.

1. 13 Eliz. cap. 20. **E**NACTS, that no lease to be made of any **S. 1.** benefice or ecclesiastical promotion with cure, or any part thereof not impropriated, shall endure longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice without absence above fourscore days in any one year, but every such lease immediately upon such absence, shall cease, and the incumbent so offending shall lose one year's profit of his benefice, to be distributed by the ordinary among the poor of the parish.

This was adjudged a general law; for though it extends only to those who have cure of souls, yet in respect of

the multiplicity of parsonages and vicarages in England, the judges must take notice of it as a general law, and adjudge it according to the said statute. And so is the statute of 21 H. 8 for non residence. Brownl. 208. Mich. 5 Jac. Jennings v. Hathwait.——Noy 124 S. C. by the name of Jennings's case, but obscurely reported.—Yelv. 106. S. C.

To bring a lease within this act it must be averred, that the parson was absent above 80 days in the same year. Golosh. 154. pl. 82. Jackson's case.——It must be alleged, that he was absent 80 days, & ultra; for he may be absent 80 days, and come again in the night of the 80th day; so that it must be expressly alleged. And of that opinion was the whole Court. Cro. E. 88. pl. 10. Hill. 30 Eliz. B. R. Gosual v. Kindermarch.——Mo 436. in the case of Robins v. Gerrard and Prince.

A parson made a lease for 21 years, rendering the ancient rent, which was confirmed by the patron and ordinary; the lessee assigned part of the term to the plaintiff, the parson died, his successor entered and made a lease to the defendant, against whom the lessee brought an action of debt upon the 1st lease; the defendant pleaded the statute 13 Eliz. which makes all leases void, where the parson is absent or not-resident for 80 days, &c. And upon a demurrer to this plea, it was adjudged that the lease was void; for the statute provides against dilapidations, and for the maintenance of hospitality. Cro. E. 123. pl. 1. Hill. 31 Eliz. B. R. Mott v. Hales.——Mo. 270. pl. 422. S. C. but the Court was divided; for Wray and Clench held the lease void, but Shute and Gawdy contra; but because the statute was misrecited, judgment was given against the defendant.——Vent. 245. Trin. 25 Car. 2. B. R. in case of Bailly v. Murrin. Twissden J. doubted whether it were so adjudged, because my Lord Coke mentions it no where, supposing so notable a point would not have escaped his observation, especially in a case wherein he was counsel. But Hale said, it was adjudged by the opinion of 3 judges; though in Moor it is said, the Court was divided, but it was a hard opinion; and that 38 Eliz. B. R. Mo. *606. the very point was adjudged contrary.——2 Lev. 62. in the case of Bayly v. Munday, S. C. cited.——* Quære if it should not be (pl. 609.) the case of † Robins v. Gerard and Prince.——† See (pl. 2.)

Note by Tanfield that by the statute 13 Eliz. cap. 20. of non-residency, that if the parson be absent 80 days in a year, although it be at several times, (viz.) 10 days at one time, and 20 days at another time, until 80 days, &c. that is within the statute, by which it has been adjudged. Noy. 116. Sidner v. Calver.

In case upon an agreement to pay money for tithes, the defendant confessed the agreement, but pleaded in bar the statutes 13 Eliz. cap. 20. & 14 Eliz. cap. 11. and shewed, that the parson was absent from his parsonage by the space of 80 days in one year, &c. The jury found, that he was not absent as alleged by the defendant; for that he dwelt in another town adjoining, and came constantly to his parish church every Sunday, Wednesday, Friday, and Saturday, and there read divine service;

service; but that he had a parsonage house in his parish fit for his habitation. Adjudged, that this was not such an absence by the space of 40 days in one year, as to avoid the lease within the said statutes. Bulst. 111, 112. Pasch. 9 Jac. B. R. *Shepherd v. Twoullie*.——The time of absence which the statute requires to avoid leases is 80 days and more, which ought to be *one continued absence* for 80 days altogether, and at one time. Arg. G. Equ. Rep. 228. cites Bulst. 111. *Shepherd v. Townlie*.——But this case was denied to be law. P. 12 Geo. G. Equ. R. 229. in the case of *Quilter v. Muffendine*.

All the justices were of opinion, that *death* will not make such a non-residence as will *avoid a lease*. Vent. 245. Trin. 25 Car. 2. B. R. in the case of *Bayly v. Murin*.——2 Lev. 62. S. P. accordingly in S. C.

[146] 2. If an incumbent be *inhibited* by the ordinary from serving the cure, and be *ejected out of the parsonage-house* by the defendant, so that the absence from the cure and residence be involuntary; a lease made by him was agreed not to become thereby void. Mo. 448. pl. 609. Hill. 38 Eliz. *Robins v. Gerard and Prince*.

The reporter adds a quære; for that it seems that by the statute 14
3. When a *parson leases to his curate, who leases over*, the statute does not make the lease void by the absence of the parson, but by the absence of the curate for 40 days. Le. 100. pl. 129. Pasch. 30 Eliz. B. R. *Saint John v. Petit*.

Eliz. the curate cannot lease, &c. Ibid.

S. C. cited per Wray, Cro. E. 245. pl. 2. as Bylow's case.
4. A parson made a *lease* for years, in which were diverse covenants, and after he became non-resident, by which the indenture became void, yet he may maintain an *action of covenant* for a covenant broken before his non-residency. Arg. cited and admitted per Wray, Cro. E. 78. to have been adjudged in 26 Eliz. in the case of *Walls v. Cox*.

(C) Indulged. In what Cases.

2 Inst. 624. I. 9 E. 2. 8. ENACTS, that *such clerks as attend in the king's service, if any offend, shall be corrected by the ordinaries, as others be: howbeit, so long as they be employed about the Exchequer, they shall not be bound to keep residence in their churches*. To this was added by the *king's counsel, †the king and his ancestors, time out of mind, have used, that clerks who are employed in his service, during the time they are so in his service, shall not be compelled to keep residence in their benefices; and such things as are found necessary for the king and commonwealth ought not to be said prejudicial to the church.

N. B. 44. (G.)——* The king's counsel is here taken for *commune concilium regni*, as it is termed in original writs, and other legal records, and so it is taken in other acts of parliament and in the preamble of this act also, where it is said, ac nuper in parlamento nostro apud Lincoln, &c. coram concilio nostro, &c. 2 Inst. 624.

† This branch is general (and not limited, as the former is, to the privilege of the Exchequer) but extends to any other service of the king for the commonwealth, as if he be employed as an *ambassador* into any foreign nation, or the like service of the king, which is pro republica, for the commonwealth, which ever must be preferred before the private. 2 Inst. 624.

Regularly personal residence is required of ecclesiastical persons upon the cures; and to that end, by the common law, if he that has a benefice with cure be chosen to an office, as that of bailiff or beadle, or the like, secular office, he may have the king's writ, *quod non eligatur in officium*, &c. 2 Inst. 625.

And the *intendment of the common law*, is, that a parson, &c. is resident upon his cure; for in an action of debt brought against J. S. rectorem de D. The defendant pleaded, that he was demur-

rant,

rent, and conversant at B. in another county. And the rule of the book is, that seeing the defendant denied not that he was rector of the church of D. he shall be deemed by law to be demurrant and conversant there for the cure of souls; and therefore the plea was over-ruled. 2 Inst. 625.—S. C. cited 11 Rep. 70. b. in Magdalen-College's case, as Mich. 10 H. 6. 8. Br. Brief, pl. 401. & Fitzh. Brief 268.

2. 21 H. 8. 13. S. 28. It is provided that this act of non-residence shall not extend to any spiritual person, as shall be in the king's service beyond sea, nor to any scholar abiding for study, without fraud or covin at any university within this realm, or without, nor to any chaplain of the king or queen's attending and abiding in their household, nor to any chaplains of the prince or princess, or of the king's or queen's children, brethren or sisters; or of any archbishop or bishop, or of any spiritual or temporal lord, or to a chaplain of any dutchess, marchioness, countess, viscountess, or baroness, or of the lord-chancellor, or treasurer of England, of the king's chamberlain, or steward of his household, the treasurer and comptroller of the household, or any chaplain of the knights of the garter, or of the ch. justice of the King's Bench, warden of the Ports, or of the master of the Rolls, nor any chaplain of the king's secretary, and dean of the chapel, or almoner, daily attending and dwelling in any of their households, during the time that any such chaplain shall abide and dwell without fraud or covin in any of the said households, nor to the master of the Rolls, dean of the arches, chancellor, or commissary of any archbishop or bishop, nor to as many of the 12 masters of Chancery, or 12 advocates of the arches as be spiritual men, during such time as they shall occupy their said offices; nor to any such spiritual persons as shall by injunction of the lord-chancellor, or the king's council be bound to attend to answer to the law.

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S. 29. Provided it shall be lawful for his majesty to licence any of his own chaplains to be non-resident on their benefices.

3. 28 H. 8. cap. 13. S. 2. Enacts, That all spiritual persons to any benefice promoted, being above the age of 40 years, (the chancellor, vice-chancellor, commissary of the universities, wardens, deans, provosts, and other head-rulers of colleges, halls, and other houses corporate within the universities, doctors of the chair, readers of divinity in the schools of divinity, excepted) shall be resident upon one of their benefices, according to the former act 21 H. 8. cap. 13. and no beneficed persons being above the age aforesaid, except before excepted, shall be excused of their non-residence, for that they be students within the universities.

S. 3. Such beneficed persons, being under the age of 40 years, resident within the universities, shall not enjoy the privilege of non-residence, unless they be present at the ordinary lectures, as well in their houses as in their schools, and keep exercises according to the statutes.

S. 5. This act shall not extend to any readers of any publick lecture in divinity, law-civil, physick, philosophy, humanity, or of any of the liberal sciences, or common teachers of the Hebrew tongue, Chaldees, or Greek, nor to any persons above the age of 40 years, which shall resort to the universities to proceed doctors in divinity, law civil, or physick, for the time of their proceeding and executing of

of such sermons, disputations or lectures, which they be bound by the statutes to do.

So if the king's chaplain be chosen dean of any church, which office requires personal attendance and resi-

4. If a bishop will cite or compel the *king's chaplains*, or the *masters of the Chancery*, which are the king's chaplains, to make their personal residence upon their benefices when they are *attending in the king's service*, they may have a prohibition unto the bishop, &c. and upon the same an alias, pluries, and attachment; but if they be not attending in the king's service, then the ordinary may compel them to make personal residence upon their benefices. F. N. B. 44 (G)

dence, and the bishop will compel him to take the deanery, which requires that personal residence, by spiritual censures and citations, &c. then he shall have a prohibition unto the bishop. F. N. B. 44 (G)—— So if the bishop will amerce the *king's chaplains*, and compel them to pay a certain sum of money for non-residence, they shall have a prohibition. F. N. B. 44. (G).

S. C. cited per Cur.

Vent. 245.

Trin. 25

Car. 2. B.

R. in the

case of Baily v. Morin.

J. S. v. Gunaystone.

5. If the patient *by advice of his physician bona fide removes for better air* and for the recovery of his health, it is a good excuse. 6 Rep. 21. b. in the case of Butler v. Goodale says it was so held in the Exchequer. Trin. 39 Eliz.

————S. P. held accordingly per tot. Cur, 2 Bull. 18 Mich. 10. Jac. J. S. v. Gunaystone.

6. *Lawful imprisonment* without covin was agreed to be a good excuse of non-residence. 6 Rep. 21. b. Pasch. 40 Eliz. B. R. in the case of Butler v. Goodale.

7. If there be *no parsonage house* there, it was agreed to be a good excuse; for impotentia excusat legem. 6 Rep. 21. b. in the case of Butler v. Goodale.

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8. *Fear of an execution* is a good excuse for non-residence. Clayt. 55. pl. 95. at the assises August, 13 Car. before Barkley J. Burley's case.

(D) Pleadings, Verdict, &c.

D. 373. a.

Marg. says,

that Trin.

12 Jac. C.

B. in the ar-

gument of

the case of

NORTON v.

SYMS, Ni-

cholas J.

was of opi-

nion that

the cove-

nants are

void only

within the

80 days,

and he

ought to

plead per-

formance

till that

time.

1. **A.** a parson for 100l. before-hand paid, by indenture *covenanted to suffer H. and his assigns to enjoy* for 12 years, and that A. would serve the cure himself, and that he would not do any act by which the benefice should be void during the said 12 years, and that one B. farmer of part of the tithes, should pay to H. and his assigns 8l. annually for 7 years, and gave bond to H. to perform the covenants. Debt being brought upon the obligation, A. pleaded performance of the covenants, ex parte sua perimplend. till 20 Eliz. at which time he himself was absent more than 80 days in the said year, and this he pleaded generally, without mentioning that B. paid the said rent of 8l. during the time, &c. or saying any thing of the statute 13 Eliz. cap. 17. or 14 Eliz. cap. 11. But as to not affirming the payment of the 8l. the Court held that the general plea, viz. ex parte sua perimplenda implied it. Quære if the covenants and obligation are merely void ab initio, or only after the absence. D. 372. b. 373. a. pl. 11. Mich. 22 & 23 Eliz. Anon.

Where the plaintiff counted upon a like covenant for enjoyment, and that the defendant afterwards

afterwards resigned, and that another parson was inducted, by reason whereof the plaintiff could not have the tithes, the defendant pleaded the statutes of 13 Eliz. cap. 20. and 14 Eliz. cap. 11. whereupon it was demurred; it was insisted that the plea in bar was not good, because it was *not averred that the defendant had been absent 80 days*; for that otherwise the covenant is not made void by those statutes. And Doderidge and Haughton J. held that the *statute of 14 Eliz. did not intend to make void any leases that were void at common law*; and therefore this covenant is not made void by the statute, unless he be absent by 80 days; quod fuit concessum per Coke; and the plaintiff had judgment. And the reporter adds, that the preamble of the 14th shews, that the intent of the 14th was to make covenants to be within the provision of the 13th, viz. to be void by absence for 40 days. Roll. Rep. 403, 404. pl. 31. Trin. 14 Jac. B. R. Rudge v. Thomas. — 2 Bulst. 202. S. C.

2. In an information for non-residence for 8 months the defendant pleaded, that *he was employed for 2 months of the time in such business for the queen, and for other months in other business, absque b/c that he was voluntarily absent* contra formam statuti: upon which there was a demurrer, and then the defendant prayed to amend his plea. Shute Baron asked him, why he had not pleaded the general issue, and given the special matter in evidence; but Manwood Ch. B. contra; because when a statute is general, and some matters are aided by proviso they ought to be pleaded, and what is contained in the proviso is not to be given in evidence. Sav. 32. pl. 75. Mich. 24 & 25 Eliz. Nevil's case.

The absence must be alleged to be voluntary, and so are the words of the statutes for absence by compulsion or restraint are out of the statute Cro. E. 100. pl. b. Butler v. Goodall.

4. Trin. 30 Eliz. B. R. Collins v. Vaughan. — G. Equ. Rep. 128. cites 6 Rep. 21. b. Butler v. Goodall.

3. In debt upon an obligation against Cox, the case was, a *parson made a lease for years, and gave bond to the lessee, to perform the covenants in the lease*; the defendant pleaded that the lease is void by the statute of 14 Eliz. because he was *absent* from his benefice *above the space of 80 days; part of which time incurred depending the action, and before the plea was pleaded*: it was the opinion of the Court, that the plea was good; but exception was taken to the pleading; the defendant says, that *the said church is a parochial church cum cura animarum, but does not say, that it was so at the time of the lease and obligation made*; for it might be, that at the time of the lease there was a vicar, and then it was not cura animarum. And afterwards upon that exception judgment was given for the plaintiff. 3 Le. 102. pl. 148. Mich. 26 Eliz. B.-R. Cox's case.

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4. In case upon *assumpsit* that plaintiff should enjoy such lands for so many years, the defendant pleaded the statute of 13 & 14 Eliz. because the land is *the glebe land of such a parsonage, and in truth the defendant did mis-recite the statute*; for the statute is, *no lease after the 15th day of May, and the pleading is (hereafter to be made) 2dly, the statute is of any benefice with cure the pleading is (of any benefice) 3dly, the statute is without absence above 80, and the pleading is (without absence by the space of 80) days: and for these causes the plaintiff had judgment*. Le. 320. pl. 449. Mich. 31 & 32 Eliz. B. R. Wollman and Fie's case.

Cro. E. 179. pl. 12. S. C. by name of Woolman v. Tye but not S. P.

5. The informer declared that the defendant was *absent a year, and because the time was not precisely alleged, the plaintiff after verdict could not have his judgment [as it seems]* see 2 Roll. Rep. 90. Pasch. 17 Jac. B. R. in Sir Geo. Curson's case, a case cited there as 34 Eliz. Brown v. Hudson.

6. Debt on a *bond conditioned*, that if the defendant should serve the cure at T. and not depart without licence, and if he should make such a lease of the parsonage of K. as the plaintiff should require and should do no act by resignation, &c. by which such lease might be avoided, that then, &c. the defendant pleaded, that the rectory of K. was a benefice with cure, and recites the statute of 13 Eliz. that no lease of any benefice with the cure should continue longer than the parson shall be resident upon it, without absenting more than 80 days, and recited it with this clause therein *tam diu* (where the words are *tam cito*) *quam ea aut aliqua pars inde veniret ad aliquam possessionem vel usum inhibitum vel, &c.* which words by the statute 14 Eliz. are repealed, and appointed to be omitted, and recited the 14th of Eliz. that all bonds, &c. made to permit any one to enjoy such leases shall be of the same effect as the lease itself; and then alledged, that the bond was made for the enjoyment of the lease. Upon demurrer, it was insisted, that the statute was mis-recited; and also that it was not alleged that the plaintiff was absent; for otherwise neither the bond nor the lease are void; and for these causes, without any argument, it was adjudged for the plaintiff that the plea was insufficient. Cro. E. 490. pl. 2. Mich. 38 & 39 Eliz. B. R. E. of Lincoln v. Hoskins.

Brownl.
208. S. C.
in totidem
verbis.

7. In trespass, the jury found the defendant vicar of D. and that he leased his vicarage for 3 years to T. S. rendering rent, and that he was absent several quarters in one year 60 days in every quarter; but they did not find the statute 13 Eliz. But adjudged for the defendant, for the statute of 13 Eliz. is a general law, and adjudged accordingly. And the law is the same of the statute 21 H. 8. of non-residency. Yelv. 106. Mich. 5 Jac. B. R. Jennings v. Haithwait.

S. P. re-
solved on
demurrer
Mich. 12
Geo. 2. B.
R. in case
of the King
v. Burton.

* Cro. C.
112. pl. 4.
Trin. 4 Car.
C. B. Far-
rington v.
Keymer
S. P.

8. Information for the king and the informer before the justices of assise upon the statute of 21 H. 8. cap. 13. for non-residence 11 months upon his church of T. &c. the defendant pleaded the said statute, that where a man hath 2 benefices, he shall be resident on one, and that he was inducted as well to the vicarage of E. as to the rectory of T. and that, during all that time mentioned in the information, he was resident upon his vicarage of E. The plaintiff demurred, because he did not shew a dispensation. But to this point no resolution was given, because the information was brought at the assises, when the statute gives it only in the king's court at Westminster, so that though the statute of 21 Jac. 4. appoints that informations taken by inquests before justices of assise, or of oyer and terminer shall be determinable there, it was resolved upon conference with the other justices, that this information * lies not before them; and judgment was given for the defendant. Cro. C. 146. pl. 26. Mich. 4 Car. B. R. Green v. Guy.

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9. Non-residence is a good plea in bar to a bill for discovery of tithes as well to the discovery as to the relief sought. G. Equ. R. 229. Pasch. 12 Geo. Quilter v. Mussendine.

For more of Residence in general see Dissmes, Estates, Presentation, and other proper Titles.

Resignation.

Resignation.

(A) Of Temporal Offices, &c. *What is.*

1. **D**ECLARING at an assembly of the corporation, that he would hold the place of alderman no longer is a good resignation, especially since the corporation accepted it, and chose another in his place; but till such election he had power to waive his resignation, but not afterwards 2 Salk. 433. the King v. Mayor of Rippon. A burges of a corporation came to the mayor, and desired the mayor to remove and

dismiss him of the place of burges. Upon return of this a mandamus was denied to restore him; for having resigned voluntarily, he is estopped to say that the mayor had no power to remove him; and the case being sent to Hale Ch. B. he agreed, and said that a corporation, as such, have power to take such resignation. Sid. 14. the King v. Tidderley.

But giving a consent to be removed, does not amount to a resignation. Per Holt Ch. J. And per Powell J. A man may resign an office by parol, but they have not returned it so; and a peremptory mandamus was granted to restore him. Holt's Rep. 450. The Queen v. Mayor, &c. of Gloucester.

2. Resignation by a common council-man need not be by deed. Lutw. 405. Mayor of Cambridge v. Herring.

(B) To whom it may be.

1. **W**HERE an alderman of Boston is a justice of peace for life, by force of the patent of the king, who created the corporation, he cannot resign his office of justice of peace; because he cannot resign it but to a superior; per Coke Ch. J. Quod fuit concessum, per Haughton. Roll. Rep. 135. pl. 19. Hill. 12 Jac. B. R. Alderman of Boston's case. Ibid. Pasch. 13 Jac. Coke Ch. J. said, that he had seen the patent, by force whereof he was a justice, which is that he shall be a justice till he be lawfully removed, and therefore he cannot relinquish it by assent; quod fuit concessum per Curiam.

S. C. cited by Coventry as MIDDLECOST'S CASE. 2 Roll. Rep. 11. Hill. 15 Jac. B. R. in HAZARD'S CASE; but the justices said, that the case was, that he could not resign it without assent, and cited Alderman MARTIN'S CASE, who resigned his place, and they resolved in the principal case of Hazard, that an alderman may resign his place by assent of the other aldermen; and whereas it was objected, that resignation cannot be but to a superior, and that the common council to whom Hazard resigned were not his superior; it was answered, that this was not properly a resignation, but a relinquishment.——See Restitution (A) pl. 3.

2. Every corporation as such, have power to take a resignation [151] of a burges of the said corporation, he praying to be dismissed of his place. Sid. 14. per Hale Ch. B. and adjudged accordingly. Mich. 12 Car. 2. B. R. the King v. Tidderley.

For more of Resignation in general, See Bonds of Resignation, Restitution, Surrender, and other Proper Titles.

Restitution.

(A) Restitution. [*Displacing and Electing to Temporal Offices.*]

3 Bulst. 190. [1. **I**F an alderman be a common drunkard, this is a good cause to
The King v. remove him from this place; for a common drunkard is
the Mayor not fit for government, and the example of it is dangerous in a
and Bur- magistrate. Trin. 14 Ja. B. R. Tailor's case, per Curiam.]
gesses of
Gloucester.

S. C. and S. P. agreed by the whole Court; but a writ of restitution was awarded; because by the return it appeared that he was removed from his place in the council-house, and not said, that it was done at a common council—2 Roll. Rep. 409. pl. 50. Taylor v. the City of Gloucester S. C.—Poph. 133. S. C. TAYLOR'S CASE, but not S. P.—2 Roll. Rep. 11. S. C. & S. P. by Montague Ch. J.

Fol. 456.

[2. If an alderman comes to the age of 70 years, yet this is not any cause to remove him from his office; for diverse men have good understanding at such age, and are well sufficient for government. M. 15 Jac. B. R. in one Hazard's case, an alderman of Gloucester; per Curiam. This matter being returned for cause of his deposition.]

S. C. and P. Poph. 133. and cited Alderman MARTIN'S CASE of London, who gave up his alderman's place, and the Court agreed, that in such case, any man

[3. An alderman of a city, by the assent of the corporation, may resign, and relinquish his office to the corporation, and the corporation may elect a new man; for there is no reason that he shall be bound to execute and continue in the office all his life against his will. And the corporation may take such surrender de jure without any power given to them by the charter to take it. Mich. 15 Ja. B. R. in one Hazard's case, an alderman of Gloucester, adjudged; this being returned for cause upon a writ. But after, it was stayed. And yet Hill. 15 Ja. it was adjudged accordingly, though a precedent of one Medlicote's case was shewn, in which it was resolved e contra. Contra H. 12 Ja. B. R. * Boston's case, per Curiam.]

may surrender his place.—* This case was, that Boston was town clerk, and was chosen alderman so put him by of his office, and so turn him out, the offices being incompatible in one and the same person, and upon his praying restitution, it was granted him. D. 322. b. Marg. pl. 28. says it was cited per Doderidge.—S. C. cited Lat. 123. in AUDLEY'S CASE, as Middlecot's case.—S. C. cited Noy. 78. in Audley's case.—See Resignation (B).

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See Disfranchisement (D) S. C. more full.

[4. If any of the bailies of a town be displaced by the mayor and burgeses of the same town, a writ may be awarded out of B. R. upon complaint there made to restore him, and if they upon the pluries do not return sufficient cause of his displacing, he shall be restored; for the bailly is an officer of the king, and so cannot be displaced]

displaced without cause. Trin. 4 Ja. B. R. between Thompson and the town of Cambridge, adjudged.]

[5. No corporation shall be *compelled by writ* out of B. R. to *elect any man to be an alderman*, for the King's Bench is not to examine who is most fit to be elected. Trin. 11 Ja. B. R. Shuttleworth's case, per curiam. Hill. 13 Ja. B. R. between the vill of * Colchester and Dorthen, per Curiam.]

a Bull. 122. S. C. by the name of Shuttleworth v. the Corporation of Lincoln, accordingly; and where A. an alderman is removed, and B. chosen in his room, and afterwards A. is restored by a writ of restitution, and B. removed and then another alderman's place becomes vacant, no writ of restitution can be granted to put B. in the place of that other alderman.

* Roll. Rep. 335. pl. 46. S. C. & P. — 3 Bull. 71. S. C. but S. P. does not appear.

[6. If a *recorder of a town dum se bene gesserit*, by which he has for his life, be *displaced*, a writ of restitution lies. P. 16 Car. B. R. such writ granted to the vill of Plympton in Devon for Sir Richard Strode the recorder there.]

[7. Such writ lies to restore a *serjeant of the town*, being displaced. P. 16 Car. B. R. such writ granted to the vill of Abergavenny]

Sty. 32. 42. S. C. argued, and rule given that the party be restored nisi causa, &c.

[8. Such writ lies to restore *one of the common council of London*, being suspended by the common council. Tr. 23 Car. B. R. adjudged in the case of Estwick; and also the same term in the case of Brett, and they restored [him] accordingly upon the return.]

9. A *constable* was chose, and *ousted by the justices of peace*, but was restored by B. R. D. 332. b. Marg. pl. 28. cites Medley's case.

S. C. cited Noy. 78. in AUDLEY'S CASE, by the name of Middleton's case.

10. A. had an ancient grant of *town-clerkship* in reversion, and the present town clerk being dead, the corporation granted the town-clerkship to B. who was in possession, whereupon A. had a writ of restitution granted him. D. 332. b. Marg. pl. 28.

S. C. cited by Doderidge J. Lat. 123. in Audley's case.

11. A *clerk of the parish* had been so 3 or 4 years, a new parson coming in ousted him, the clerk not being sworn: the parson had not power to oust him, and a mandat awarded to swear him; but the Court would not award writ of restitution, because the clerk had *remedy at law*. Mar. 101. pl. 174. Trin. 17 Car. B. R. Anon.

12. A *mandamus to restore* M. to the place of one of the approved men of Guildford; and upon the return appeared just cause of restitution, and thereupon the *parties submitted by rule of court to two persons*, who awarded that M. should be restored, and the approved men refused to restore him. Upon this, an attachment was moved for against the approved men; but per Cur. an attachment does not lie against a corporation; but if it be granted nisi, and the corporation will not restore him, the *Court will grant a restitution*. Raym. 152. Pasch. 18 Car. 2. B. R. Mills v. the Approved Men of Guildford.

13. No restitution can be *on a writ of mandamus ill directed*. Per Cur. 2 Jo. 52. Trin. 28 Car. 2. B. R. in Holt's case the recorder of Abingdon.

See 2 Salk. 700. pl. 3. where the case itself is denied to be law-

14. There cannot be any cause to disfranchise a member of a corporation, unless it be for such a thing done, as *works to the destruction of *the body corporate*, or of the liberties and privileges thereof, and not any personal offence of one member to another. Per tot. Cur. Carth. 176. Hill. 2 & 3 W. & M. B. R. in Sir Thomas Earle's case.

See Forcible
Entry (L)

(B) *To whom and by whom, in Cases of Forcible Entry.*

1. **I**N forcible entry, though it does not appear in the indictment that it was taken at the complaint of the party, yet the party shall have restitution. Br. Restitution, pl. 24. cites 7 E. 4. 18.

2. If a man be indicted of forcible entry before the justices of peace, and the record is removed into B. R. they shall make restitution. Br. Restitution, pl. 11. cites 14 H. 7. 15.

3. Where it is found by indictment that J. N. entered with force, and held with force, yet notwithstanding that he has retained by 3 years, restitution shall be awarded; and yet the party in this case shall not have action upon the statute of anno 8 H. 6. of forcible entry: and yet the indictment is good for the king, and the party shall have restitution. Br. Restitution, pl. 12. cites 14 H. 7. 28.

4. On an indictment of forcible entry, restitution must be to reversioner, and not to lessee for years; for he that is disseised shall be restored, and then lessee may re-enter. Le. 327. pl. 461. Trin. 31 Eliz. B. R. Sover's case.

See Return
(O) Ro-
berts v. Ag-
monde-
sham.

5. By colour of a writ of *vi laica removenda* awarded out of the Chancery returnable in this court, W. was put out of possession by the sheriff, and the possession by that means gotten by his adversary; and this being suggested to the Court by affidavit, restitution was awarded, and to that purpose a precedent was shewn 35 Eliz. Rot. 66. between ERKENSALL AND PALMER, for the parsonage of Wiberton in the county of Cambridge in such case, where, upon such a suggestion, restitution was awarded. Cro. E. (465. bis) pl. 13. Hill. 38 Eliz. in B. R. Wilkinson's case.

(C) *In Cases of Stolen Goods.*

Dalt. Just.
cap. 164.
cites S. C.

1. **I**T was agreed in B. R. and by those of C. B. that in appeal of money taken felonice, if the defendant is convicted, restitution shall be awarded of money, notwithstanding that there is no property known. Br. Restitution, pl. 22. cites 7 E. 2.

2. If a man be robbed, and sues appeal, and the defendant is attainted at his suit, the plaintiff shall have restitution of his goods. Br. Restitution, pl. 15. cites 26 Aff. 16.

3. In appeal of robbery, if the defendant pleads not guilty, and before the venire facias returned, the defendant escapes to the church, and

and abjures, the plaintiff shall have restitution of his goods. Br. Restitution, pl. 16. cites 26 Aff. 32.

4. In *appeal of robbery*, if the defendant *stands mute*, and is put to penance, the plaintiff shall have restitution; quod nota. Br. Restitution, pl. 19. cites 43 Aff. 30. Br. Corone, pl. 123. cites S. C. — S. P.

Br. Restitution, pl. 15. cites 26 Aff. 16. — Where a man *stands mute*, and it is found by malice, and that he was taken at the *fresh suit* of the plaintiff, and the property of the goods in the plaintiff, the plaintiff shall have * restitution of the goods where the defendant is put to penance, because he stood mute. Br. Restitution, pl. 5. cites 8 H. 4. 2. — Br. Appeal, pl. 24. cites S. C.

5. *Three persons sued 3 several appeals against one and the same person*, and he was convicted at the suit of the one; and therefore he was hanged, and the others were not restored to their goods, but they were forfeited. Br. Restitution, pl. 1. cites 44 E. 3. 44. * [154]
Dalt. Just. cap. 164. cites S. C. — Brooke says, quod mirum! For

he says Wilby did otherwise, and inquired by inquest if the defendant was taken at their suit, and if they were their chattles, and found that they were, by which they were restored; for no default was in them; quod nota. Br. Restitution, pl. 1. cites 44 E. 3. 44. — S. P. Dalt. Just. cap. 164.

Two brought several appeals, and the defendant was convicted at the suit of the first, and the same inquest of office inquired, if he was guilty of the second felony, who found that he was, and the one and the other made fresh suit, and the one and the other were restored to their chattles with which the defendant was taken with the manner, and the defendant was hanged. Br. Restitution, pl. 4. cites 7 H. 4. 31. — Br. Appeal, pl. 4. cites S. C.

A man was appealed by three several appeals of felony, and was severally found guilty, and yet each was restored to his goods. Br. Restitution, pl. 30. cites 4 E. 4. 11.

If a thief robs or steals goods from three men severally, and he be indicted for the robbing or stealing from one of them, and arraigned thereupon, in this case, though the other two would give evidence against the offender, yet shall not they have restitution of their goods, by the meaning of the statute 21 H. 8. 11. For the felon is not attainted of any other felony, saving of that whereof he is indicted. Dalt. Just. cap. 164.

6. And where the defendant has his clergy, the plaintiff shall have restitution of his goods. Br. Restitution, pl. 1. cites 44 E. 3. 44. In appeal of felony, the defendant took to his

clergy, and confessed the felony, by which the plaintiff had restitution upon inquiry if he was taken at his fresh suit. Br. Restitution, pl. 36. cites 2 R. 3. 13.

Note per justiciarios, that it is the common course in appeal, if the defendant takes to his clergy, the plaintiff shall have restitution of his goods taken, as if he had been attainted at his suit; quod non negatur; and Fairfax and Brian said, that Prisot in his time put the defendant always first to answer to the felony without having his clergy before answer; but per Hufsey, Choke and Littleton, it is usual where he takes clergy at the first, to award inquest of office in such case. Br. Restitution, pl. 20. cites 3 H. 7. 12.

7. If a thief steals diverse goods, and the owner in his appeal omits any part, the king shall have all that is omitted, because by this omission the thief may escape, and since the owner cannot have them, the king shall. 5 Rep. 110. a. cites 45 E. 3. Tit. Corone 100. 3 Inst. 227. cap. 202. says, they are forfeited to the king for the favour which

the law presumes, the plaintiff bears to the felon; and therefore he cannot have restitution for more than is in his appeal. — Kelyng. 49. cites S. C. — 2 Hawk. Pl. C. 171. cap. 23. S. 57. S. P. for the same reason, and also because, as it seems, the restitution ought regularly to be grounded on the record of the appeal; and by that no other goods can appear to have been stolen than what are mentioned in it. But whether an appellant who had, before his appeal brought, lawfully regained the possession of his goods stolen, shall forfeit to the king such of them as he leaves out of his appeal, does neither clearly appear from the principal case concerning this matter, nor from any of the books therein cited, which seem chiefly to rely on the authority of it. — See pl. 12. a note from 2 Hawk. Pl. C. 172. cap. 23. S. 57.

8. Where the defendant dies in prison before the attainder, the plaintiff shall not be restored. Quære inde if he makes fresh suit. Br. Restitution, pl. 30. cites 4 E. 4. 11.

See (pl. 12.) 9. *Appeal of robbery against R. B. as principal, and others as*
 —S. P. *accessaries, and the principal was outlawed. The plaintiff shewed,*
 Dalt. Just. *that J. N. had the goods, and prayed writ of restitution to the*
 cap. 164. *sheriff to make to him deliverance, and had it without enquiring*
 R. was rob- *of the fresh suit. Br. Restitution, pl. 25. cites 21 E. 4. 16.*
 b'd by S.
 and within

a week after the robbery R. preferred an indictment against him, and within a month after the robbery he sued an appeal and prosecuted the same to outlawry. Coke moved to have restitution of the goods taken; but B. of the Crown-office said, that the *fresh suit was not inquired*; for upon an appeal one shall not have restitution without fresh suit. Coke said, the books are, that if the defendant in an appeal of robbery be attainted by verdict, the fresh suit shall be enquired of; but here he was attainted by outlawry, and not by verdict, and so it cannot be enquired; and here the indictment within a week, and the appeal within a month after the robbery, is a fresh suit. Wray said, fresh suit in our law is to pursue the felon from town to town, but the suing of an appeal is not any fresh suit; and cited 21 E. 4. 16. Restitution granted upon an outlawry in an appeal of robbery, without fresh suit enquired; * 1 H. 4. 5. if he confess the felony. 2 Le. 108. pl. 138. Trin. 30 Eliz. B. R. Roper's case.—4 Le. 47. pl. 125. S. C. reported in the same words.

As to the enquiry of the fresh suit, Serj. Hawkins says, it seems that it is usual and proper to make such enquiry by the same jury that tries the principal matter; and it is certain that upon the finding of the fresh suit by such jury, the Court may award a restitution; and in such cases wherein the appellee is condemned without any trial, as where he is convicted by his own confession, or outlawed, or stands mute, &c. it seems, that the Court may make such enquiry by an inquest of office returned for such purpose, and on their finding the fresh suit award a restitution; but in either case such inquest is but an inquest of office, and perhaps is not absolutely necessary, but required chiefly for the satisfaction of the conscience of the judges in a matter which, if they think fit, they may, by the purport of some authorities, examine themselves. And it is holden in the best authors, that the judging of fresh suit lies in the discretion of the Court; and there is a case wherein the restitution of the goods stolen was actually awarded without making any enquiry of the fresh suit; but in the book wherein this case is reported it is made a † quære, whether such enquiry ought not to be made at the return of such writ. 2 Hawk. Pl. C. 169. cap. 23. S. 52.—† Staundf. Pl. C. 166. b. (A).

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* But if such seizure be, the owner ought to take appeal, and then he shall

10. But it was granted by all the Court, that if A. steals goods and waives them, that the owner may re-seize them 20 years after * if the king or lord of the franchise has not seized them. Br. Restitution, pl. 25.

re-have them if he makes fresh suit; so note, that fresh suit and appeal shall avoid the waiving. Ibid.

A. stole goods from B.—B. made fresh suit to take the felon, so that he waives the goods, and flies. The goods are seized as waifs. Harvey & Croke J. held, that they are not forfeited, B. having done his endeavour, and pursued from village to village, and that waifs are only where it is not known to whom the property is. But Hutton and Yelverton held, that if the goods are seized before the owner comes, the property is altered, and in the lord, though the owner made fresh suit, unless it was always within view of the felon. But all agreed, that if the felon does not fly, but is apprehended with the goods, the owner shall have his goods without question; so if he challenges them before seizure and after the flight of the felon. Harvey said, the statute 21 H. 8. cap. 13. [11.] gives no remedy as to the restitution of the goods stolen, but upon the evidence of the party or others by his procurement, as it was in an appeal upon a fresh suit at common law. Hel. 64, 65. Mich. 3 Car. C. B. Dickson's case.

11. A merchant, stranger to the country, who is in amity with the king, shall have restitution if he be robbed; but if he be not of the amity, &c. or be robbed by him who is not under the obedience of the king at the time; &c. or in amity, he shall not have restitution; for there every one may take that can take. Br. Restitution, pl. 35. cites F. N. B.

Before this statute there was no aid by way of indictment for the party robbed

12. 21 H. 8. cap. 11. Enacts, That if any felon or felons hereafter do rob, or take away any money, or goods, or chattels, from any of the king's subjects, from their persons or otherwise, within this realm, and thereof the said felon or felons be indicted, and after arraigned of the same felony, and found guilty thereof, or otherwise attainted

attainted by reason of evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement, † that then the party so robbed, or owner, shall be restored to his said money, goods, and chattels; and that as well the justices of goal-delivery as other justices, afore whom any such felon or felons shall be found guilty, or otherwise attainted, by reason of evidence given by the party so robb.d, or owner, or by any other by their procurement, have power, by this present act, to award, from time to time, writs of restitution for the said money, goods, and chattels, in like manner † as though any such felon or felons were attainted at the suit of the party in appeal.

bed; for though the inquest, that tried the felon, would, after the finding him guilty, say, that the party robbed had made fresh suit, yet this would not intitle

him to restitution of his goods, as appears Fitzh. tit. Coronæ, pl. 460. Hill. 22 E. 3. till this statute granted restitution upon evidence given by the party against the felon, as it seems, though he never made fresh suit against the felon. Staunf. Pl. C. 167. lib. 3. cap. 10. (A)——Serjeant Hawkins says, that this seems agreeable to practice and the purport of the first part of the statute; but that if it shall plainly appear to the Court; that the party has been guilty of *gross neglect in prosecuting the offender*, it may reasonably be argued, that he is not intitled to a restitution; for the latter part of the statute, by ordaining, that writs of restitution shall be awarded as though the felon had been attainted in an appeal, seems to imply, that it is a sufficient favour, within the intentions of the makers of the statute, to the prosecutor of an indictment to give him a like remedy for a restitution of his goods, as the common law gave to the plaintiff in an appeal; but it is certain, that the plaintiff in an appeal, who appears to have been guilty of such a neglect, cannot demand a restitution by the common law. And the serjeant says, that the construction he would contend for will appear the more reasonable if it be considered that it hardly can be imagined to be the intention of the makers of the statute to give the party a greater benefit from a conviction grounded * on his own evidence, as a conviction on an indictment may be, than from a conviction on the evidence of others, as a conviction in appeal must be; however, if it shall appear to the Court upon the evidence at the trial, or otherwise, that the party has been reasonably diligent in prosecuting the offence, he readily grants, that the justices may, if they think fit, in their discretion award a restitution without making any enquiry concerning the fresh suit; but this seems to be no more than they may also do in appeal; if they think fit. 2 Hawk. Pl. C. 171. cap. 23. Sect. 56.

† S. P. Because it is the suit of the king. But restitution was to be made upon an * [156] appeal, which is the suit of the party. 3 Inst. 242. cap. 106.

+ 2 Inst. 714. in the margin, says, note these absolute words for restitution; upon the evidence given upon this act, there *needs no fresh suit to be enquired of*, as we know by experience.—But Kelving's Rep. 96. Mich. 8. W. 3. in the case of ARMSTRONG v. Lisle, it is said, that *in an appeal of robbery or larceny*, though the defendant did not plead in abatement for want of fresh suit, but was thereupon convicted, yet the appellant could not have restitution unless the jury did find *the fresh suit*.—See pl. 8.

By this statute the party robbed, or owner, shall have restitution notwithstanding any sale in market overt. And *the reason of the law in this case of restitution is to encourage the owners to pursue the felons that they might be condignly punished.* 2 Inst. 714.

In an appeal of robbery against one, who took from him certain *sacks of corn*, and prayed to have restitution of his corn, In hden there demanded, if the corn was still in the sacks, or not: for if out of the sacks it would be very hard to make restitution, and there he *restored according to the value of the corn.* 2 Bulst. 310. Hill. 12 Jac. ISAACK v. CLARK, cites 3 E. 3. Fitzh. Corone, pl. 323. And says, that with this agrees 7 E. 6. Br. tit. Restitution, pl. 22. and that this was so at the common law, and not upon the statute 21 H. 8. cap. 11. which gives writs of restitution to the party robbed; and it was before agreed here in this court, that a man shall have restitution notwithstanding the property is not known, but he shall have like in value; and where there is a defect of proof, the law shall supply it.

A *servant took gold from his master, and changed it into silver*; the master shall have restitution of the silver by this statute. Cited by Fenner, Cro. E. 661. pl. 9. in the case of HOLIDAY v. Hicks, to have been adjudged in Hanberrie's case.

A *stole cattle, and sold them at Coventry, in an open market*, and immediately he was apprehended by the sheriffs of Coventry, and they *seised the money*; and afterwards the thief was arraigned and hanged at the suit of the owner of the cattle. And by the Court, the party shall have restitution of the money, notwithstanding the words of 21 H. 8. The goods stolen, &c. And Crooka said, that it is usual at Newgate. Noy. 128. Harris's case.

The words of the statute are general, that *where the thief is convicted at the prosecution of the party robbed*, there the party shall have restitution; and takes no notice, whether the goods are sold in a market overt, or not; so that by this statute the common law is altered as to that point. And as for the BISHOP of WORCESTER's case, [1 Mo. 360. where to a restitution granted at a sessions of Newgate, the party who had bought the goods pleaded a sale to him in a market overt, there the case was adjudged against the defendant, because it appeared not to be a sale in a market

overt; for it was plate sold in a scrivener's shop in London. But there no question is made, but that a sale in a market overt would have hindered the restitution, and bound the property of the right owner] 'tis true the inference of the book is as it is there said; but the main point was not there in question, although in those times there was a doubtful opinion what the law was. And Kelyng says, he spake with Mr. Lee, a very good clerk, who has attended the sessions at the Old Bailey above 40 years, and asked him how the practice there was; and he told him, it was doubted till about 4 & 5 Car. 1. and then Justice Jones and several other judges advised about it, and did resolve, that the party who lost the goods and prosecuted the felon to conviction, should have restitution of his goods which were stolen, notwithstanding they were sold in a market overt: and ever since that time, he says, the practice has been accordingly. And if any one pleads to a writ of restitution in such a case, that he bought the goods in a market overt, ever since that resolution, the other party presently demurred unto it, and had judgment. And he thinks it to be a very good resolution, warranted by the words of the statute of 21 H. 8. and that it tends to the advancement of justice to make men prosecute felons, and it will discourage persons from buying stolen goods, though in a market overt; for under that pretence men buy goods there for a small value of persons whom they have reason to suspect, which practice this resolution will abate. Kelyng's Rep. 47. 48.—S. P. Dalt. Just. Marg. cap. 164.

¶ See Kelyng's Rep. 35. where this case had been cited and agreed to by Hyde Ch. J. and Kelyng himself.

2 Hawk. Pl. C. 172. cap. 23. S. 57. says, That there is a special case where the appellant shall recover things which were neither stolen from him, nor mentioned in his appeal; as where the appellee *sells the things stolen, or exchanges them* for some other thing *before the appeal* brought; and the money taken on the sale or thing given in exchange, are seized to the king's use, &c. in which case they shall be delivered to the appellant on the conviction of the appellee, though they were never in his possession before; for he appears to be in no manner of fault, and there is no reason that he should be prejudiced by the act of the felon. And the serjeant says, he takes it for granted, that in all these cases the law is the same at this day in relation to a restitution, by force of the above-cited statute of 21 H. 8. to the prosecutor of an indictment.—See pl. 7.

3 Inst. 242. cap. 106. cites Stanford, fo. 167. a. b. & lib. 5. fo. 110. & lib. 6. fo. 80. that though this statute speaks only of the party robbed, yet his *** executors are within the statute*, and so are his administrators; for it is a beneficial law, and gives a more speedy remedy to the party robbed, &c. than the common law gave by way of appeal, *and therefore ought to be construed beneficially.*—** S. P. Dalt. Just. cap. 164.

† 2 Inst. 714. in the margin, says, these words refer only to the manner of the writs of restitution.

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(D) Where there must be a *Scire facias*.

1. **I**F a man is *attainted* of treason, and *his land seised*, and he *dies*, and his *heir is restored by parliament*, and is *seised*, and after is *ousted*, he shall not have *scire facias* to execute the act of restitution; because it was executed by the seisin before, and therefore he shall have *assise*. Br. *Scire facias*, pl. 78. cites 11 H. 4. 67.

S. P. Br. Parliament, pl. 43. cites 5 H. 7. 31. 2. By restitution *by parliament* the party restored may enter without *scire facias*; for every man is party to the act. Br. Parliament, pl. 41. cites 4 H. 7. 10. Per Townsend J.

Per Cur. Here is an extravagant error; for upon the reversal the judgment is, that the party be restored to whatsoever he has lost &c. but that must be known, and the way is, 3. The defendaht's *attainder of high treason* being reversed for want of the words (*ipso vivente*) in that part of the sentence which concerns the burning of his bowels; and the judgment of reversal being affirmed in parliament restitution was awarded by B. R. in Ireland, without any *scire facias* against tertenants of *patentees* of W's estate; and writ of error was brought into B. R. here, and this was clearly allowed to be a good error. But it was excepted against the writ, because it did not appear by it who were *parties to the award of restitution*; for if the award of restitution be reversed, there must go a *scire facias* against the present tertenants, which cannot be if it does not appear by the writ who they are. 12 Mod. 312. Mich. 11 W. 3. B. R. Dillon v. Walcot.

to come and *suggest that he was seised of such and such land, &c.* and to take a *scire facias* against the

the *terrenants*; and they thereupon ought to be summoned, and may come and *shew cause against restitution*, as perhaps a *fine levied* by the heir, &c. or by party himself; and it would be prudent in a purchaser of an attainted person's estate to procure such a fine; and this has been done by the purchasers of H. MARTIN's estate while he lay condemned in the Tower. 12 Mod. 407. Dillon v. Walcot.

4. *Where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there because it appears on the record, that the money is paid, the party shall have restitution without a scire facias, and there is a certainty of what was lost; otherwise where it was levied, but not paid: there must then be a scire facias, suggesting the matter of fact, viz. The sum levied, &c. but where judgment is set aside after execution for irregularity, there needs no scire facias for restitution, but an attachment shall be granted upon the rule for contempt, if there be not a restitution. Per Holt Ch. J. 2 Salk. 588. pl. 4. Pasch. 4 Ann. B. R. Anon.*

(E) *Of Lands and Goods seised. How to be granted, and where Cause must be shewn.*

1. **T**HE *possessions and lands of a prior alien were seised into the hands of the king by war with France; and because the prior was born in Gascoigne, which is within the allegiance of the king, therefore he was restored by ouster le main of land, and did not speak of advowson; and yet because the king seised without cause, and also the seisure was general, therefore restitution general also suffices; and so the king shall not have presentation to the advowson which voids after. Br. Restitution, pl. 17. cites 27 Aff. 48.*

2. A man is attached by pone, and is *essoigned at the day*, and the sheriff takes his goods attached; and because they are saved by the *essoign*, therefore he shall have writ of restitution of them to the sheriff. Br. Restitution, pl. 29. cites 34 H. 6. 29. [158]

3. In *homine replegiando* the plaintiff said, that the defendant had taken his goods pending the issue, and the defendant did not deny it; by which the plaintiff had restitution where he was claimed as villein. Br. Restitution, pl. 34. cites 6 E. 4. 8.

4. Clerk convicted after his purgation shall have restitution by writ of restitution of his goods: *quære inde*. Br. Restitution, pl. 38. cites F. N. B. 66.

5. He that will have restitution of goods seised, upon sureties shall *shew cause* by plea in court before. Sav. 3. pl. 7. Pasch. 22 Eliz. Anon.

For more of Restitution in general, see *Fresh-Suit, Robbery, Outlawry*, and other proper Titles.

* These are writs that the demandant or plaintiff, [to whose action the defendant pleaded excommunication, &c.]

after he has obtained his letters of absolution, &c. may sue out to bring the tenant or defendant again into Court to have day to make answer unto him; and

these writs do lie in all cases when the plea is discontinued, or put without day, either in this case or in case when the demandant or tenant has his *age*, or for the *not coming of the justices*, or in case of a *protection*, or *essoine de service le roy*, &c. Of these writs there be 2 sorts, viz. † general and special. Co. Litt. 135. b. — † S. P. 7 Rep. 29. b. in the case of discontinuance of process, &c. and see there the several forms of them. — Co. Litt. 135. b. S. P. and says, that in these 5 cases writ shall abate, but in the writ of excommunication the writ shall not abate, but the plea shall be put sine die unless the plaintiff purchase his letters of absolution and sue out his resummons or re-attachment.

† Br. Resummons, pl. 17. cites 8 H. 6. 20.

* Re-summons, Re-garnishment, and Re-attachment.

(A) Considered how; and what shall be good Cause of Resummons, &c.

1. **W**HERE a bailiff in the franchise *errs in the process*, &c. before judgment, *as where he will not grant the view where the view lies*, or *will not record default*, &c. or *will not give judgment*, the party cannot have writ of error, but resummons: *but if wrong be done to the tenant or defendant* resummons does not lie. Br. Conusans, pl. 27. cites † 8 H. 6. 18. Per Marten.

2. Where *conusance of plea* is granted to the bailiffs of a franchise, there if they *fail the party of right* he shall have resummons, *and the cause of the failer of right is traversable*. Br. Resummons, pl. 3. cites 34 H. 6. 53.

[159] 3. Re-attachment was sued after the death of King R. 3. and there was no roll thereof; and yet good by the opinion of the Court; for *re-attachment by the death of the king is as a new original*; contra of resummons for *failer of right in a franchise* after conusance of pleas granted, or *scire facias* to execute a remainder by fine, or *re-attachment after protection* cast, if the resummons or re-attachment bears *date after the year*, &c. Br. Re-attachment, pl. 16. cites 1 H. 7. 21.

(B) Awarded. At what Time, and where.

1. **I**F in *assise against baron and feme*, the baron makes default, and the *feme is received*, and after the *parol is without day*, the plaintiff may have his *re-attachment against the baron and feme*, or *against the feme alone at his pleasure*; and per Norton, the tenant

tenant is more at large when the parol is without day by *not coming of the justices*, than he is when it is by *protection*; for Wilby said that there the *tenants might hold them to their first plea, or plead de novo*; quære tamen. And where they were *adjourned* upon the pleading in tres Sept. Pasch. and at the day the *baron made default*, and the *feme was received and pleaded*, and had Octo trinitat. and at the day the parol was without day by *not coming of the justices*, and the plaintiff sued re-attachment returnable after in 15 Hill. *ubicunque*, &c. which is in B. R. where by magna charta assise shall be brought in proprio comitatu; and yet well, because it was commenced in proprio comitatu. Br. Re-attachment, pl. 7. cites 24 E. 3. 23

2. If *scire facias* is *sine die* by *protection*, a man shall have *regarnishment* there, as he shall have *resummons* or *re-attachment* upon original put *sine die*. And the *protection* was from the 7th January, to continue for one year; and the teste of the *regarnishment* was the 8th day of January then next following. And the opinion of the Court was, that it is well, and yet the 7th day shall not be accounted for one of the days, and yet well; for a man may have a new writ bearing date the same day that his writ abates; quod quære inde. Br. Re-attachment, pl. 33. cites 40 E. 3. 18.

3. If *protection* is cast, by which the parol is without day by a year and day, and after the party does not go according to his *protection*, there the plaintiff shall have *resummons* within the year, by shewing of this matter. Br. Resummons, pl. 37. cites 47 E. 3. 6.

So in debt the defendant cast *protection*, by which the parol was without

day, and the plaintiff sued *repellance* within the year, and repealed it, there the plaintiff shall have *resummons* within the year, notwithstanding that the first judgment was, that the parol shall be *sine die* by a year and a day. Br. Resummons, pl. 30. cites 3 H. 6. 40.

In *trespass*, the defendant cast *protection*, which was allowed, and the next day the plaintiff shewed *repellance*, by which he prayed re-attachment, and had it immediately within the year, and *habeas corpora* against the jury; quod nota. Br. Re-attachment, pl. 2. cites 34 H. 6. 4.

4. In assise of *mortdancestor*, if the tenant is *essoigned*, and at the day he makes default, *resummons* does not lie there, but immediately upon default made upon the original. Br. Resummons, pl. 34. cites 4 H. 6. 23.

Resummons shall not issue, but immediately after the return of

the summons. Br. Resummons, pl. 29. cites 18 E. 4. 8.—Br. Process, pl. 119. cites S. C.

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5. In appeal of the death of the ancestor within the year, the writ was delivered to the sheriff, and before the return thereof, the king dies, and also the year was past before the day of the return of the writ; and the plaintiff removed the writ into B. R. by *certiorari*, and the sheriff had done nothing in serving thereof, and re-attachment was granted, though the writ did not come in by return in court; for otherwise the party shall lose * his appeal, because the year is passed. Br. Re-attachment, pl. 27. cites 10 E. 4. 13.

Br. Relation, pl. 24. cites S. C.—Br. Appeal, pl. 98. cites S. C.—Br. Certiorari, pl. 12. cites S. C.—Where ap-

peal of death is without day by demise of the king, the re-attachment to revive the original shall be brought within the year after the death of the king; and otherwise the appeal is gone. Br. Re-attachment, pl. 17. cites 2 H. 7. 10.

If an appeal had been avoied by the demise of the king, before 2 Ed. 6. cap. 7. (by which this mischief is provided against) it seems clear, that the appellant might have sued a re-attachment against the appellee, within the year and day after such demise; for that he was in no default, and otherwise would.

would have been without remedy. 2 Hawk. Pl. C. 163. cap. 23. S. 33.——And ibid. 299. c. p. 27. S. 105. The serjeant says he does not find it any where said, that the pleas and other proceedings therein being put without day by the demise of the king, might not be revived by a special re-attachment, in the same manner as in any other action: however, it is certain at this day, it is at by force of 1 Ed. 6. cap. 7. and 1 Ann. cap. 8. Neither the writ nor bill, nor any plea, nor proceedings therein, shall be any way discontinued, or put without day by such demise.

6. So of *formedon purchased within the year after title accrued* against pignor of the profits, and the king died before the return of the writ, the writ shall be removed by certiorari as above, and resummons shall be granted for the mischief, &c. Br. Re-attachment, pl. 27. cites 10 E. 4. 13.

* See (F)
pl. 1. 2.

(C) *In what Cases and actions, and * how.*

1. **I**N *assise against two, the one pleaded foreign release, and the other to the assise; and it was adjourned into bank for the foreign plea, and against the other it was fine die, and at the day in bank the foreign pleader made default, and the assise was adjourned into pais without re-attachment against him who pleaded to the assise; and he pleaded release of all actions after the day in bank, & non allocatur; for he had no day in court without re-attachment, but the other had always day in court till now.* Br. Re-attachment, pl. 30. 22 Aff. 26.

The nature of a resummons is to continue the original writ; for by the common law no resummons did lie but against

2. It was said, the resummons *does not lie but where the parol is without day without folly of the plaintiff, as by demise of the king, not coming of the justices, protection, cesser of an eyre, &c.* Br. Resummons, pl. 33. cites 24 E. 3. 48.

3. *But if it be discontinued, a man shall not have resummons; for the original is determined, and therefore there it does not lie, though it be in case of ward, where resummons is given by statute.* Br. Resummons, pl. 33. cites 24 E. 3. 48.

him that was party to the original, or which came in by voucher or receipt, &c. so long as the tenant lived, and only where the plea was put without day without any laches or default in the party, as upon a conusance granted, and failure of right by the demise of the king, the non venu of the justices, or when the parol demurred for nonage, or upon the allowance of a protection, and the like; but if the process be not continued by the negligence of the plaintiff, no resummons lies. 2 Inst. 441.——* 13 E. 1. cap. 35.

4. In *assise the parol was without day mesne between the verdict and the judgment, by removing of the justices, by which the plaintiff sued writ to make the record to come before the new justice to have judgment, and the record was brought before them, but not the original nor the pannel, by which the justices would do nothing; wherefore he caused them to come by another writ, upon which the justices awarded re-attachment ad audiendum judicium; quod nota.* Br. Re-attachment, pl. 32. cites 26 Aff. 20.

5. In *assise, the bailiff of the franchise had conusance, and after the plaintiff sued re-attachment, which was pone per vadios, &c. ita quod loquela sit in eodem statu, & quod ballivi sibi de recto deferunt,*

cerunt, &c. & § quod habeas corpora juratorum return', &c. Br. * It should be pl. 67.
Re-attachment, pl. 8. cites 26 Aff. * 66.

6. In assise, *conusance of pleas was granted to S. and after the plaintiff sued re-attachment for failer of right in the franchise; for at one day the tenant pleaded to the assise, at which day the bailiffs would do nothing, but gave day over, and at the day did not come.* Br. Re-attachment, pl. 11. cites 31 Aff. 9.

7. In *scire facias*, the prayee in aid cast protection, which bore date 7th day of January per unum annum duraturum, and the plaintiff brought regarnishment in lieu of resummons upon scire facias, as he ought. Br. Resummons, pl. 4. cites 40 E. 3. 18.

8. Where ward is brought against two, and the one dies, the plaintiff shall not have resummons against the other; for one is alive who may answer of the ward: and so it seems that the writ shall abate, and the plaintiff shall have a new original against the survivor. Br. Resummons, pl. 5. cites 50 E. 3. 7. Br. Gard, pl. 20. cites 50 E. 3. 70. [But it should be 7. b. pl. 15.]

The survivor shall have the ward, and the branch of the statute Westm. 2. cap. 25. gives the resummons either against the executors or heir; and in this case *pars defendens non est mortua.* 2 Inst. 441.

9. If a judge takes *conusance of a fine*, and the king dies, the writ of covenant shall be resummoned, and the conusance shall be certified by writ directed to the justice. Br. Resummons, pl. 8. cites 8 H. 4. 5. So if writ of covenant to levy a fine be returned, and the king's money

entered, and after the king dies before the engrossment of the fine, the writ of covenant may be resummoned, and then the fine may be engross'd; quod nota. Br. Resummons, pl. 21. cites 1 H. 7. 10. — Br. Fine, pl. 85. cites S. C.

10. In assise of *mortdancestor*, the tenant is *essoined*, and at the day, &c. makes default, the assise shall be awarded by his default; for resummons does not lie there, but upon immediate default made upon the original. Br. Resummons, pl. 34. cites 4 H. 6. 23. So in attain, if the tenant is essoined at the return of the sum-

mons, and at the day makes default, resummons shall not issue, but the attain shall be awarded by default; for resummons shall not issue but immediately after the return of the summons. Br. Resummons, pl. 29. cites 18 E. 4. 8.

11. In *trespass in London in the time of H. 6.* the defendant pleaded *arbitrement in Kent*, and so to issue, and process continued to the *habeas corpora*, and there the *parol* was put without day, because King E. 4. as lawful and true heir to E. 3. and also to King R. 2. took upon him the dignity of the crown, by which at the prayer of the plaintiff, re-attachment was granted against the defendant to the sheriff of London, and *rehabeas corpora* against the jury to the sheriff of Kent; quod nota. Br. Re-attachment, pl. 19. cites 1 E. 4. 1.

12. In recordare they were at issue, and it passed for the defendant, and after the plea was removed without day by demise of the king, by which the defendant prayed resummons, in the name of plaintiff, and could not have it; but the opinion of several was, that he shall have a special writ upon the matter, and both parties shall be warned, and by others the defendant shall have *scire facias*. Br. Resummons, pl. 23. cites 2 E. 4. 9.

Br. Re-attachment, 25. cites S. C.—
The opinion of the Court was,

that in this case the plaintiff should have re attachment, notwithstanding that *no process was in the original* which was by bill; for otherwise the plaintiff shall lose the advantage of the pleading before, and his costs, which shall be mischievous, &c. Br. Re-attachment, pl. 23. cites S. C.

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Br. Scire facias, pl. 195. cites S. C.

13. In *formedon* the parties were at issue, process continued to the *habeas corpora*, and after the parol was *sine die* by deposition of King E. 4. and the demandant had resummons against the tenant, and in the same writ *habeas corpora* against the jury. Br. Resummons, pl. 24. cites 10 E. 4. 13.

14. In *avowry* the parties were at issue, and *venire facias* returned, and *habeas corpora* awarded, and after the parol was without day by demise of the king, and the defendant prayed *scire facias* against the plaintiff to bear the jury, and *habeas corpora* against the jury; and all the justices agreed that he shall have *scire facias*, and this for the mischief of having return. Br. Resummons, pl. 26. cites 10 E. 4. 15.

15. In *detinue* if the defendant prays garnishment against J. who comes and pleads with the plaintiff, and after the parol is without day, the garnishee shall have *scire facias*. Ibid. per Catesby.

Br. Scire facias, pl. 195. cites S. C.

16. So where 2 several writs of ward are brought against one and the same man, by which they enterplead upon the first original, and after the parol is without day, and the first plaintiff will not sue resummons, the second plaintiff shall have *scire facias* against the first plaintiff: to which all the justices agreed. Br. Resummons, pl. 26. cites 10 E. 4. 15.

17. So in *quare impedit* for the default; for every one is actor against the other. Br. Resummons, pl. 26. cites 10 E. 4. 15.

Br. Scire facias, pl. 195. cites S. C.

18. So in *quo jure* for the plaintiff, if the parol be without day after he has made title. Br. Resummons, pl. 26. cites 10 E. 4. 15.

19. And so it seems that where the defendant is become actor, or is in case to recover nothing, or to have nothing against the plaintiff that he shall have *scire facias* in this case. Br. Resummons, pl. 26. cites 10 E. 4. 15.

Br. Re-attachment, pl. 29. cites S. C. Per Jenney, quod Choke J. concessit Brooke says, and so

20. *Contra in appeal*, there, if the parties are at issue, and after the parol is without day, the defendant shall not have re-attachment to recover damages against the plaintiff; for he is not intitled to have damages till he be *licito modo acquietatus*; for he was never in jeopardy. Per Choke J. quod non negatur. Br. Resummons, pl. 26. cites 10 E. 4. 16.

see that if he had been intitled by acquittal, there he might have the *scire facias*.
Br. Scire facias, pl. 195. cites S. C.

21. If a man brings *formedon* against *pernour* of the profits within the year after title accrued to the demandant, and before the return of the writ the king dies, the writ shall be removed into C. B. by *certiorari*, and upon this he shall have resummons for the mischief. Br. Resummons, pl. 27. cites 10 E. 4. 14.

22. The same of re-attachment in appeal of death. Ibid.

23. *Trespas* in C. B. against 2, who pleaded several pleas to issue, and several *venire facias*'s, and *habeas corpora*'s, and after the parol was without day by deposition of E. 4. The plaintiff had one

one re-attachment against both; *ad audiendum juratores patrie*, in quos se separatim posuerunt, and habeas corpora in the same writ against both the juries. Br. Re-attachment, pl. 24. cites 10 E. 4. 13.

24. In trespass in B. R. the parties were at issue, and at the *nisi prius* the defendant made default, and the inquest awarded against him by default, and passed for the plaintiff, and after before the day in bank, the king died, and so the parol was without day; and it was held, that the plaintiff ought to have re-attachment against the defendant to hear his judgment, notwithstanding that he was out of court by his default, but the defendant shall not plead thereupon; but judgment cannot be given till it be revived by re-attachment to give the defendant day in court to stand to the judgment. Br. Re-attachment, pl. 28. cites 10 E. 4. 14.

And by Billinge, if the verdict had passed against the plaintiff, or if the plaintiff had been nonsuit in appeal at the *nisi prius*, and the parol was with-

out day, as above, before the day in bank, the *certiorari* shall be sued the next term, to make the defendant able to pray judgment against the plaintiff. Brook makes a *quere* if it can be without *scire facias* against the plaintiff. Br. Re-attachment, pl. 28. cites 10 E. 4. 14.

25. In account, the defendant was awarded to account, and *capias ad computandum* issued, and it was returned *cepi corpus*, and he accounted before the auditors, and pleaded a plea to issue triable in a foreign county, and found mainprize by recognizance, and after the issue was discontinued by demise of the king; and the plaintiff prayed *capias ad computandum de novo*, and could neither have that nor resummons, but special *scire facias* comprehending all the matter, and habeas corpora, and distress against the jury, and the *scire facias* was sued where the original was sued. Br. Resummons, pl. 44. cites 1 E. 5. 1.

[163] In account, the defendant was awarded to account, and pleaded to issue before the auditors, which was after without day by demise of the king, by

which *scire facias* with habeas corpora jurat. issued. And so see that resummons does not lie; for the original was in a manner determined by the award to account before, which is a judgment; and yet two judgments shall be in account before that it be ended. Br. Resummons, pl. 35. cites 1 H. 7. 1.

26. Where process shall be said to be put without day. It seems agreed, that by the common law all proceedings upon any indictment, information or popular actions whereon no judgment had been given, were wholly determined by the demise of the king, and that nothing remained but the indictment or information, original writ or bill, which were put without day till re-continued by re-attachment, to bring in the defendants to plead de novo. But this is fully provided for by 4 & 5 W. 3. 18. and 1 Ann. 8. by which it is enacted, that such process, &c. shall continue in the same force after the king's demise, as it would have had if he had lived. 2 Hawk. Pl. C. 299. cap. 27. S. 104.

(D) In what Cases. General or Special.

1. **A**SSISE against an infant and J. S. of a rent-charge by deed, the infant pleaded that *ne charga pas* by the deed which bore date in a foreign county, by which it was adjourned into bank,

bank, and the assise was without day against J. S. and was tried for the plaintiff in bank by nisi prius, and remanded into pais to be taken, and re-attachment sued against the others, who were sine die, which re-attachment did not make mention of any day certain; but quod fuit ad ass. And therefore per Cur. he was awarded to sue a new writ, quod nota; for per Shard, if a general re-attachment had been sued to re-attach all assises; yet in this case he ought to have a special re-attachment; quod non negatur. Br. Re-attachment, pl. 31. cites 26 Ass. 3.

2. Assise was adjourned to Westminster for difficulty, and then the assise was awarded, and a special re-attachment against A. where the assise was against A. and three others; and at the day all the justices did not come, and general re-attachment issued to attach all the assises. Persey said, this assise ought to have been attached by special re-attachment, and therefore the plaintiff was directed to sue another re-attachment against the next sessions; for three were not yet re-attached, but A. only. Br. Re-attachment, pl. 13. cites 39 Ass. 5.

[164] 3. In assise it was at another time sent to the bishop to certify if the plaintiff was a bastard or mulier, returnable at the next sessions, and at the day the parties were without day, by not coming of the justices, and now are the assise, and the parties re-attached by a general re-attachment for all assises, but no writ sent again to certify, and now the bishop certified by the first writ, that the father and mother were espoused, and he born in the espousals, and the espousals continued all their lives; and the certificate awarded good, notwithstanding that new writ of certificate was not awarded, and the plaintiff recovered the land against him who appeared only, and not against the others who did not appear; quod nota. Br. Re-attachment, pl. 14. cites 43 Ass. 11.

4. In writ of error it was said, by Hank. for law, that it is the office of the justices of assise after the parol is without day to re-attach all the assise by a general writ without suit or appearance of the party. Br. Re-attachment, pl. 5. cites 8 H. 4. 5.

5. Appeal against several, whereof some dwelt in a foreign county, and therefore capias with proclamations issued in this county according to the statute, and was returned served, by which exigent issued, and before the return, the king died; and therefore it was said, because he had not sued a special re-attachment reciting the process, he ought to have writ with proclamation, contra upon such special re-attachment; for this shall revive the process. Br. Re-attachment, pl. 34. cites 1 E. 5. 2. and says, see the book.

(E) Sued. By whom.

3 Inst. 441. cites S.C. accordingly, and that the writ

I. IF baron and feme bring writ of ward, and the baron dies pending the writ, the feme shall not have resummons; for the statute speaks only of heir or executor, and therefore she is put to a new original.

original. Br. Resummons, pl. 41. cites 19 E. 3. and Fitzh. Sci. fa. 119. shall abate, because one of the plain-

tiffs is alive, to whom the wardship surviveth, & pars querens non obiit. — So if 2 joint lords, or coparceners of a seignory, bring a writ of ward, and one of the plaintiffs dies, the writ is abated, and the survivor shall not have a resummons, for the stat. Westm. 2. cap. 35. gives the resummons either to the heir, or to the executors, and not to any survivor who may have a new original. 2 Inst. 441.

2. A man brought writ of ward, and died, and his heir brought resummons, and not the executor; because it was by reason of his proper fee according to the statute of Westminster 2. cap. 35. and after the defendant died, and then the heir brought resummons against the executors of the defendant; quod nota. Br. Resummons, pl. 18. cites 24 E. 3. 48. Where some have holden that the makers of this act were not learned in the law, because the

resummons is given to the heir, where by law the heir cannot have the wardship, being but a chattel, the makers of the law knew that as well as the objector; for it is said in 9 Ed. 3. that they were sage gents that were at this parliament, but seeing no resummons in this case did lie by the common law, the makers of this act gave the resummons to the heir, when the wardship accrued *ratione proprii feodi*; for there the inheritance of the tenure might come in question, which concerned the heir more than the wardship, hac vice, could concern the executors; and as if the defendant make his testament, and devise the ward to another, yet the resummons shall be awarded by the next subsequent clause of this act against the executors, although they have nothing in the ward, and for their insufficiency against the heir, who cannot claim, the ward being but a chattel; so in *novi casu providebant novum remedium*; and in one case charged the heir of the defendant, whom the law could not charge, and in another gave remedy to another heir upon a good reason, who by law had none. 2 Inst. 441. cap. 35.

If the plaintiff in the writ of ward dies, and a resummons is sued by the heir, if the defendant dies the heir shall have a resummons against the executors of the defendant; for the words of the branch of the statute be, *inter querentem, vel ejus hæredem seu executores, & executores defendenti, &c.* 2 Inst. 441. cap. 35.

3. In *præcipe quod reddat*, consufance of the plea was granted, and the tenant sued resummons for failing him of right; quod miror; that the tenant shall have it. Br. Resummons, pl. 19. cites 39 E. 3. 17. 2 Inst. 441. cap. 35. says, the tenant shall not have resummons, be-

cause he never sued out summons.

4. If in trespass verdict passes for the defendant, he may cause the record to be brought into court, and have judgment against the plaintiff to be barred, though the plaintiff had no day in court, by reason of † the deposition of the king, in whose time the verdict was given; for the * defendant cannot have resummons nor re-attachment, but some hold in B. R. that he shall have scire facias; quod nota. Br. Re-attachment, pl. 22. cites * 10 E. 4. 13. [165]† Br. Scire fa. 181. cites S. C. — * 7 Rep. 30. S. P. in the case of discontinuance of process, &c. because he had nei-

ther summons nor attachment; and because at common law, if a verdict had passed for the defendant, and before the day in bank, the king had died; in this case there is a discontinuance, and the defendant may by certiorari remove the record, and though the parties shall not plead any plea, yet the defendant ought to sue scire facias, but without scire facias he shall not have judgment; because the parties have no day in court, and the scire facias shall revive the record, and give day to the parties contrary to the opinion of Littleton. 10 E. 4. 13. b. though he says, it was so adjudged, that the defendant in such case should have judgment immediately. — S. P. 2 Inst. 441. cap. 35.

5. In debt against two executors, the one was summoned and severed, and the other and the defendant were at issue, and after the parcel was without day by demise of King E. 4. and per Littleton, the

the resummons shall be *by him who sued alone, and not by both.*
Br. Resummons, pl. 25. cites 10 E. 4. 13.

(F) Sued. *Against whom.*

1. **I**N assise against baron and feme, the feme was received, and pleaded, and bad day, at which day the assise was without day by not coming of the justices, and by general re-attachment the baron and feme were re-attached. Per Perley, the re-attachment is without warrant; for it ought to have been against them who last bad day, and then was the baron out of court, and without day; and it was touched, that the writ ought to have been special, making mention, &c. As it seems, it shall make mention of all the circumstances, and of the last day in court between the parties. Br. Re attachment, pl. 10. cites 30 Ass. 39.

2. Mortdancester was long depending by argument of a demurrer upon estoppel, and after the assise was awarded at large, because an *infant* was tenant, who pleaded estoppel, which was not a good estoppel; and the Court was in doubt if they should award the resummons against the jury, or against the party; and per Cur. it was awarded against both; quod nota; and this resummons was the process made upon the original, and not the resummons to revive the plea after it is *sine die*; for upon the one lies essoin, and upon the other not. Br. Resummons, pl. 20. cites 30 Ass. 51.

3. In assise they are adjourned to Westminster, and there they resolved and remanded the assise into pais, to inquire, &c. For it was after the issue, at which day no special re-attachment was sued to re-attach the jury; and though the parties have day fixed, yet the jury not being re-attached, the justices commanded them to sue re-attachment. Br. Re-attachment, pl. 12. cites 38 Ass. 29.

Br. Charters
de Terre,
pl. 6. cites
S. C.

4. Where the defendant in detinue prays garnishment, and the garnishee comes and is at issue with the plaintiff, and after the garnishee dies, the plaintiff shall have resummons against the defendant, and scire facias against the heir or executors of the garnishee, and the writ shall not abate. Br. Resummons, pl. 2. cites 9 H. 6. 36.

5. Resummons shall be against the defendant and the garnishee in writ of detinue. Per Brian. Br. Resummons, pl. 45. cites

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S. P. 2 Inst.
441.

1 E. 5. 3.

6. Resummons cannot be against him who was not summoned. Br. Resummons, pl. 22. cites 5 H. 7. 38.

And in a
resummons
against the
heir for the
insufficiency
of the exe-
cutors, it is
a good plea

7. A resummons lies not against the heir of the defendant, if the executors have assets; and it is a good plea for the heir to say, that the * executors have sufficient; but if the executors have assets for part, and the heir effects for part, yet no resummons is given against them both by this act. 2 Inst. 441, 442. cap. 35.

for him, that he has nothing by descent in fee simple. 2 Inst. 442. cap. 35.

(G) Discontinued,

(G) *Discontinued, and the Effect thereof.*

1. **W**RIT of right; two were received and vouched, and the vouchee came and joined the mise, and writ issued to the sheriff to cause 4 knights to come to make the grand assise, returnable, &c. and at the day the vouchee and one of the prayees were dead, which was shewn to the Court by which issued resummons returnable, &c. At which day the defendant was essoined, and at the day Culpeper said, the process is discontinued; for it ought to have been certified by return of the sheriff, and yet he was awarded to answer. Br. Resummons, pl. 7. cites 7 H. 4. 3.

(H) *Revived, what; and in what Cases.*

1. **P**RÆCIPERE quod reddat against the prior of B. they were at issue, and when the inquest appeared, the tenant brought superseas to stay it, inasmuch as he was a prior alien, and the king had seised his temporalities during the war, and leased to him in farm, and that they should not proceed; and upon this he prayed aid of the king, and the parol was without day, and after the demandant obtained procedendo, and sued resummons, and the demandant prayed habeas corpora against the jury, because they appeared before, and could have only venire facias de novo, and the sheriff may return a new pane, and so he had; and so see that the resummons is not revived, but only the issue, and not the venire facias, and process upon it; quod nota. Br. Resummons, pl. 15. cites 21 E. 3. 44.

Br. Resummons, pl. 32. cites S. C.

2. In account they were at issue, and found for the plaintiff, and capias ad computandum issued, and after exigent, and after the parol was without day, and the plaintiff brought resummons, and prayed exigent allocatis com. by default of the defendant. Wilby said, you shall have only a pone per vadios, and so it seems, that nothing is revived but only the original. Br. Resummons, pl. 16. cites 21 E. 3. 49.

3. Note, that where writ of ward is brought, and after is discontinued, and the plaintiff dies, this cannot be revived by resummons. Br. Resummons, pl. 18. cites 24 E. 3. 48.

For resummons is to revive the original, which cannot be re-

vived where it is discontinued, which is the default and folly of the party, but death is the act of God of which the statute has provided a remedy, but not after discontinuance, quod nota; per Wilby and others clearly. Ibid.

4. In assise by 2, the one would not sue, and at the day of the return of the summons ad sequendum simul the parol was without day; there a general resummons will not revive the writ of summons ad sequendum simul; for it seems that process cannot be revived. Br. [167] Resummons, pl. 36. cites 44 E. 3. 16.

5. Formedon against baron and feme, and the feme was received in default of the baron, and vouched; the vouchee entered and died. Resummons

Resummons was sued against the feme; and per Marten J. the feme shall now be in the same degree that she was at the time of the receipt. Br. Resummons, pl. 14. cites 9 H. 5. 4.

It seems to be holden by some, that all causes, whether civil or criminal, are discontinued; and by others, who seem to speak more accurately, that they are put without day by the justices, before whom they were depending, not coming on the day at which they are continued, whether such absence was occasioned by death, or any other cause; but it seems to be agreed by all, that a cause so discontinued, or put without day, cannot be revived without a resummons or re-attachment, which, if they are special, may revive the whole pro-

6. Assise against two, the one pleaded nul tort, and the other said, that the tenements are seised into the hands of the king, and this found by examination of the escheator, whereupon they ceased; by which the plaintiff obtained procedendo in loquela to the justices, and after all was put without day by not coming of the justices, and a general re-attachment was sued before the new justices without any new procedendo, and the parties pleaded to issue, and it was found for the plaintiff, and thereupon they were adjourned to Westminster for difficulty of the verdict; and thereupon came writ to them, rehearsing that the tenements were in the hands of the king, commanding them that they do not proceed to judgment rege inconsulto. And there it was agreed per tot. Cur. that they could not proceed rege inconsulto, by reason of this last writ, and otherwise they might have proceeded; for when the first assise was without day by the not coming of the justices, and the plaintiff sued general re-attachment, this shall revive but only the first original, and not the first matter, which proved the seisin in the king; and also the first procedendo directed to the old justices cannot serve the new justices to proceed, but because by general re-attachment nothing is of record but the first original, therefore they might proceed, if no later writ had come to certify them of the seisin of the king: and per tot. Cur. and the prothonotaries upon general re-attachment the parties shall plead de novo, though they had pleaded to the assise before, quod nota; for the writ is quod re-attaches A. B. vel ballivum suum, and a bailiff cannot plead nor maintain pleas in bar; but contra of special re-attachment; for there, if they were at issue upon a foreign release, &c. and after the plea is without day, &c. and revived by special re-attachment rehearsing the matter, there they shall not plead de novo, but after the plea pleaded the party shall not be received to say that the tenements are in the hands of the king. And per tot. Cur. by special re-attachment, all the matter which is done upon the first original shall be of record again, and so it was agreed in the principal case, that the justices should not proceed without procedendo ad judicium: and so it seems, that the proceeding to the verdict is good without any procedendo in loquela; quod nota. Br. Re-attachment, pl. 1. cites 9 H. 6. 40.

And says he does not find that any Statute has remedied this mischief, except in the case of assises, and juris utrum, which are provided for by 1 E. 6. cap. 7. 2 Hawk. Pl. C. 300. cap. 27. S. 106.

7. In trespass the parties were at issue in the time of E. 4. and at the nisi prius it was found for the plaintiff, and before the day in bank the parol was without day by deposition of King E. 4. and it was held that the plaintiff shall have re-attachment to revive the issue, and to have his judgment, and to give day in court; but at this day the parties shall not plead, but this shall revive the first issue only, and therefore if nihil be returned, upon such re-attachment or resummons no alias shall issue; for it is not to give day to plead, and therefore he shall have

have judgment upon the resummons returned nihil; but first *certiorari* shall issue out of the same bank to return the record of *nisi prius*. And per Littleton, if such *verdict* had passed for the defendant, he might cause the record to be brought into court, and have judgment against the plaintiff to be barred, though the plaintiff had no day in court; for the defendant cannot have resummons nor re-attachment: but some held in B. R. that he shall have *scire facias*, quod [168] nota. Br. Re-attachment, pl. 22. cites 10 E. 4. 13.

8. [Though] resummons is *ita quod loquela illa sit in eodem statu quo fuit tali die*, yet it ought to have good interpretation; for it shall not be said in *eodem statu* to all intents. Per Davers, Br. Resummons, pl. 22. cites 5 H. 7. 38.

For where a man in *præcipe* quod reddat prays to be received by

default of the tenant, and the receipt is counter-pleaded, he who prays shall not be *essoined*; but contra upon resummons against the tenant, and him after the *parol* without day. Ibid.

9. General resummons revives the original, or the issue, if they were at issue, but no pleadings if the parties were not at issue before that the *parol* was put without day; but special resummons revives the issue or process. Br. Resummons, pl. 22. cites 5 H. 7. 38. Per Brian.

S.P. 7 Rep. 29. b. Trin. 1 Jac. in the case of discontinuance of process, &c. and ibid. 30. a. says it appears by the book of Entries, Tit. Re-attach-

10. But where special resummons is sued, making mention of the tenant and vouchee, there all is revived; and the same of the pleadings, per Brian: *quære* of process or default. Br. Resummons, pl. 22.

ment, 499. That if issue be joined, and jury returned, and day given for trial, before which day the king dies, yet by special resummons all shall be revived; for the jury was returned of record, and the record thereof was made full and perfect; and that with this agrees D. 118. a. 8 Mar. [pl. 78.] But cites 21 E. 3. 44. Contra in case of aid prayer; for there the jury is not revived, as it is held there, but a *venire fac. de novo* shall be awarded.

11. By excommunication writ of *detinue* shall not abate, as upon plea of *villeinage*, *profession*, *præmunire*, &c. but it shall be *sine die & tempore*, and it may be revived by resummons or re-attachment; quod nota. Br. Excommengement, pl. 1. cites Litt. 44.

(I) New Defence.

1. **I**N writ of ward, if the defendant pleads to the action, and dies before trial, by which the plaintiff brings resummons against the executors of the defendant, according to the *statute of Westm. 2. cap. 35. the executors shall not plead to the writ any new matter in bar, varying from the first matter, unless it arises of a later time, by reason that the testator pleaded in bar before; and also it seems that the writ of resummons revives the first issue, &c. quod nota, per judicium. Br. Exception, pl. 6. cites 24 E. 3. 25. 26.

* Upon the resummons by this act, the party cannot vary from the former plea, but only for matter that comes of

peine time, as a release, &c. 2 Inst. 441. cap. 35.—Br. Resummons, pl. 43. cites 24 E. 3. 25. 48.

2. In a general re-attachment, the defendant may vary from his first plea. Contra upon a special re-attachment. Br. Re-attachment, pl. 34. cites 1 E. 5. 2.

This case is very short, and mentions nothing of the opinion of the Court at the book of 1 E. 4. 3 & 4. but for that see 2 E. 4. 10. a. b. pl. 1.

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3. In *cui in vita*, the tenant after the view said that the demandant had entered after the last continuance; judgment of the writ, and so to issue; and after the parol was without day by demise of King H. 6. and the demandant sued resummons against the tenant, and *rehabeas corpora* against the jury returnable presently; and the tenant said that after the last continuance the same demandant brought assise against R. and S. &c. of one acre parcel of the demand, and recovered and entered, and pleaded all certainly, and averred that this is parcel of the land in demand in the *cui in vita*. Per Moyle J. the tenant may plead *de novo* upon the resummons, and therefore may have two pleas after the last continuance in such case; but Choke J. said no, he is not now at large; for he shall plead no plea which is contrary to the plea which he pleaded before; for if he had vouched before, he could not now plead in bar, nor things discordant or variant from his first plea, but may aver matter which stands with, &c. and therefore per tot. Cur. this plea above and all defaults before made are void, and are not revived by the resummons; quod nota; and therefore the tenant shall not be compelled to save those defaults now in the resummons. And the same law, if default upon default was recorded in the first action, he shall not be compelled to answer to them in the resummons, but the tenant shall plead as if no default had been made; and if he makes default, grand cape shall issue, which was not denied; therefore quære. Br. Re-attachment, pl. 21. cites 1 E. 4. 3 & 4.

4. In *trespass*, the defendant appeared and imparled, and at the day made default, and writ awarded to inquire of damages returnable, &c. and before the day the king died; and at another term in the time of H. 7. the party prayed another writ to inquire of damages; and by one of the justices, he can have only re-attachment, and in this the defendant may plead *de novo* of a matter happening of later time. And therefore it seems, that by the re-attachment the first default remains of record, by reason that it is said that he shall plead that which arises of later time. Br. Re-attachment, pl. 15. cites 1 H. 7. 11.

(K) *Against whom. Vouches, Tenants, or some of them, and How.*

1. **I**N *cui in vita*, the tenant vouched three, and the parol demurred for the non-age of the one, by which the demandant recovered immediately by the statute of *expectet emptor*, and before full age the demandant died, [and when all were of full age] the tenant brought resummons, and the vouchee could not bar the demandant, by which he recovered against the tenant, and the tenant over in value against the vouchee. Br. Resummons, pl. 40. cites 3 E. 2. and Fitzh. Voucher 210.

2. In *præcipe quod reddat*, the tenant vouched J. and A. his feme, and this by lien of the feme or her ancestor, as it seems, who entered into the warranty, and vouched B. who entered into the warranty,

entry, and after pleaded the death of J. by which the demandant had resummons against the tenant; for if the demandant recovered against the tenant, and he over in value against J. and A. where J. is dead; this is error. Br. Resummons, pl. 39. cites 18 E. 3. 17.

3. *Præcipe quod reddat*; per Finch. if the tenant vouches A. who enters, &c. and vouches B. the demandant may say after that A. the first vouchee is dead, and pray resummons against the vouchee, inasmuch as it cannot come in by return of the sheriff; quod non negatur, and it seems reason; for otherwise error shall be in the judgment. Br. Resummons, pl. 47. cites 40 E. 3. 37.

And see Fitz. Voucher 4. That the second vouchee may shew this matter

after issue tendered; that is to say, after the last continuance, and pray resummons, and have it, because otherwise if judgment shall be given, this shall be error; quod nota. Ibid.

4. In *præcipe quod reddat*, the tenant vouched one who entered and joined issue, and pending this the king died, by which the parol was without day: and per Suliard and Brian, the resummons shall be against the tenant *ad audiendum judicium*, and against the vouchee *ad audiendum juratores*; for judgment shall be given against the tenant, and over in value against the vouchee; and Choke and Vavisor contra, and that it shall be against the vouchee only. Br. Resummons, pl. 45. cites 1 E. 5. 3. [170]

5. And by several counsel, resummons after a receipt in *præcipe quod reddat*, shall be against the tenant by receipt only; for per vavisor, the surplus shall abate the writ, if it shall be against the tenant and the vouchee. But Brook says, quære totum. Br. Resummons, pl. 54. cites 1 E. 5. 3.

6. Formedon against M. who vouched one to warranty, who entered into the voucher, and vouched over one who was summoned and entered into the warranty, and vouched an infant within age, and pray that the parol demur, and so it did, and after resummons was sued against the tenant, the first vouchee and the second vouchee, and not against the infant within age, for he was not summoned; and resummons cannot be against him who was not summoned; quod nota. Br. Resummons, pl. 22. cites 5 H. 7. 38.

But it was held there, that where one vouches, and the vouchee is summoned, and after the plea is *fine die*, by demise of

the king or otherwise, before that he enters into the warranty, there the resummons shall be against the tenant and the vouchee; for there the vouchee was summoned. Ibid.

7. At the full age of the vouchee, the tenant shall sue a resummons. 2 Inst. 456.

(L) Process.

1. **I**N waste at the grand distress, the parol was without day by protection, and the plaintiff brought resummons, and the defendant made default, the process shall be pone, and not writ to inquire of the waste. Br. Resummons, pl. 42. cites 27 E. 3. 78.

2. In entry *sur disseisin*, the parties were at issue, and after the parol was without day by not coming of the justices, and after a resummons was sued against the tenant, and *habeas corpora* against the first jurors in the same writ, and the writ was returned served, and the tenant made default: and per Chock and Brian, petit cape shall issue,

issue, and not grand cape; for resummons, which revives the first issue, is special resummons, and therefore this revives the first appearance, and therefore petit cape lies; but Littleton contra, & adjournatur. Br. Resummons, pl. 28. cites 13 E. 4. 1.

(M) *Pleadings. Abatement, &c.*

1. **S** *SCIRE facias*, the prayee in aid cast protection, which bore date the 7th day of January, per unum annum duraturum, and the plaintiff brought regarnishment in lieu of resummons, upon scire facias as he ought, and it bore date the 8th day of January then next following; and it was held there, that it was well brought, and that the same day that one writ abates, a man may bring another; quære inde; for this 8th day is the last day of the year: but if it had been the 9th day, this had been clear. Br. Resummons, pl. 4. cites 40 E. 3. 18.

2. Where resummons is sued out of a franchise, the writ shall say, resummoned per bonos summonitores, and not per bonos re-summonitores. Br. Resummons, pl. 11. cites 11 H. 4.

[171] 3. In detinue the defendant said, that the writing was delivered to him by the plaintiff and another upon certain condition, &c. and prayed garnishment against the other, and the writ of detinue was returnable 15 Mich. and the scire facias was returnable 15 Martini, and at the day of the return of the scire facias the garnishee cast protection, by which the parol was put without day, and after the plaintiff sued resummons against the defendant to revive the parol in the same plight as it was 15 Mich. Strange said, the resummons is not good; for it shall be in the same plight as it was at Martini, at which day the parol was put without day by protection; judgment of the writ; et non allocatur; for the garnishee nor the vouchee are not parties till they have appeared, and enterpleaded, or enter into the warranty, and therefore the writ of resummons shall make mention of the last day only, which the defendant had in court, which was 15 Mich. in this case; quod nota per Cur. and the defendant was awarded to answer over. Br. Resummons, pl. 1. cites 3 H. 6. 45.

For more of Resummons in general see *Conusance, Easement, Protection, Receipt, and other Proper Titles.*

Return.

(A) Rescous [of the Body.] What shall be a good Return.

[1. IF the sheriff returns *in bank* a rescous made to his bailly- † [172]
errant by these words, scilicet, *virtute istius brevis, &c.* D. 241.
mandavi ballivo meo itineranti, &c. qui mihi sic respondit, quod Marg. pl.
arrestavit, &c. shewing the year, day, and place, and the rescous 47. says that
was made, &c. this is not good; because * this arrest is the proper Fol. 457.
arrest of the sheriff himself, and no credit to be given to the *saying*
or answer of the bailly errant. † D. 7. El. 241. 47. per Curiam. Hill. 41
39 H. 6. 42.] Eliz. C. B.
The Court

took a difference, viz. where the sheriff returns a rescous made to his bailiff, it is good, where he takes cognizance of it himself; but if he returns rescous by report of his bailiff, as in the principal case here (*mihi sic respondit*) it is not good; and that this difference was agreed by Walmsey, Anderson and Glanvil, in a case moved by Williams, for divers poor men.——Trin. 42 Eliz. B. R. the sheriff returned *rescussit de ballivo*, and it was held ill.——[But afterwards it is there said] Yet see, at this day the return is good; because he returns *veritatem facti*, and that so it had been taken. Mich. 38 & 39 Eliz. upon a rescue returned by the sheriff of the county of Hereford.

† S. C. cited 2 Roll. Rep. 78. Hill. 16 Jac. B. R. in case of *SNELLING v. Low*, and there Montague Ch. J. said, that the reason why the sheriff ought to return the rescue made to himself, and not to his bailiff, though in fact the force was done to his bailiff, is, that the bailiff is not officer to the Court, but the sheriff only, and the process is directed to him.

If rescous be made to the servant of the sheriff, coroner, &c. it shall be returned as made to the sheriff himself, or coroner himself; for the arrest is the act of the sheriff himself, or coroner himself, and therefore the rescous to the servant is a rescous to the sheriff himself or coroner himself. Br. Return de Briefs, pl. 66. cites 39 H. 6. 40.——Br. Rescous, pl. 15. cites 39 H. 6. 42. S. C. [In the Year Book it begins at 40. b. pl. 4. and ends at 42. a.]——S. C. cited 5 Mod. 217. Arg. in *STRANGEWAIR'S CASE* Trin. † 8 W. 3. and said, that ever since this case, it has always been allowed to be a good exception to a return of a rescous, where the party is indicted for it, and rescued out of the custody of the sheriff's bailiff.

An exception was taken to quash a writ of rescous. 1st, Because it is *quod arrestavit*, without saying (*& in custodia sua habuit*) 2dly, Because it is, that the defendants rescued him out of the custody of the bailiff, where it ought to be out of the custody of the sheriff. Twisden said, that the last exception had been ruled both ways, when the return is made by the bailiff of the sheriff; but that it is good when made by the bailiff of a liberty. But Keling Cn. J. said, that it had been usually quashed for this; but all agreed to quash it for the first exception. Sid. 332. pl. 16. Pasch. 19 Car. 2. B. R. Anon.——Lev. 214. S. C. by the name of the *KING v. SIMMS* accordingly, otherwise where the bailiff of the liberty has the return of all writs, and to this purpose were cited * Sty. 417. † Cro. E. 781. D. 241. Lat. 184. and that of this opinion was Keling Ch. J. but Twisden and Windham contra; for there is *veritas facti* & *veritas legis*, and that here the return is of the truth of the fact, which is as good as the truth of the law, viz. in *custodia mea*, and that either of the ways are good. 2dly, It is not returned, that they rescued themselves, nor who it was that rescued them. 3dly, It is not said expressly that they were in *custodia* of the bailiff; but only by implication that they were rescued extra *custodiam* of the bailiff, and therefore the justices agreed to quash it, and it was quashed accordingly.——Raym. 161. S. C. That the return was quashed by the other justices, but that Twisden held contra.——S. C. cited 5 Mod. 218. Arg. in *Strangewaier's case*.

* 1654. Anon.——† *Russel v. Wood*.

Exception was taken to a return of rescous, because it is returned to be done to the bailiff, where the warrant and rescue being to the sheriff's bailiff, and not to the bailiff of a franchise, ought to be returned to be done to the sheriff himself, and not to the bailiff; but per Cur. it is good both

ways. 2 Lev. 28. Mich. 23 Car. 2. B. R. The King v. Clapham.—S. P. Non allocatur; for the custody of the bailiffs virtue warranti of the sheriff is the custody of the sheriff. 2 Jo. 197. Pasch. 34 Car. 2. B. R. Penfold, Mariner, and five others.—S. P. And where the bailiff made the return of the rescous from himself, and exception was taken thereto, yet the Court and the Clerks said, the precedents were in that manner: but the Court said, it was good the other way also; for in law it is the rescue from the sheriff, though in fact it is from the bailiff; and the exception was disallowed. Palm. 532. Pasch. 4 Car. B. R. Cane's case.

A motion was made to quash a rescous returned against G. because, it was said to be *ex custodia ballivorum*; whereas it should be *ex custodia vicecomit*; for the custody of the bailiffs is the custody of the sheriffs. Per Cur. both ways are good, and so it has been frequently adjudged. 12 Mod. 94. The King v. Giles.

Cro. J. 241. [2. But such return in *banco regis* is good enough; because there
pl. 7. Pasch. it is the common use, and the precedents there are accordingly,
8 Jac. in the Mich. 8 Ja. in the Exchequer between Kent and Helwayes, per
Exchequer Chamber. Curiam. M. 11 Ja. B. R. adjudged.]
S. C.—

Jenk. 315. pl. 2. S. C.—Lane 70, 71. S. C. by the name of Kent v. Kelway.

[3. Such return in B. by a bailiff of a franchise, who has return of writs, and execution of them, is good enough. D. 7 El. 241. 47.]

Cro. J. 241. [4. P. 8 Ja. between Kent and Helwayes in action upon the
pl. 7. S. C. case for a rescous upon a *latitat*, which was returnable in the
by the name of Kent v. King's Bench.]

Elwis.—Lane 70, 71. S. C. by the name of KENT v. KELWAY, and it was agreed, that the declaration is good enough, to say that he was rescued out of the hands of the deputy bailiff, and that the course of B. R. was always so upon the return of a rescue, notwithstanding 7 Eliz. D. 241. and that the declaration that he had sued an alias capias was good, without mentioning that any *latitat* was sued before; and that the arrest by the deputy bailiff, by virtue of a warrant delivered to the sheriff, was good. But the reporter adds a quære, if they should not examine whether the bailiff [who was bailiff by patent] had a power by his patent to make a deputy.

Cro. J. 241. S. C. in the Exchequer, and it was assigned for error. 1st, That the *custom of B. R.* is alleged to be, *that if any one arrested comes sub custodia vicecomit. he shall put in bail*, which is not so; for he shall be in custod' *mareschalli*, and no declaration can be against him *sub custodia vicecomitis* sed non allocatur; for the substance of the matter is, that he sued out process to have him arrested for this cause, and he being arrested, was rescued; which is the ground of the action: and all which is alleged concerning the custom, is *idle*, and the shewing thereof shall not hurt him. 2dly, (Whereupon it was chiefly insisted) for that it is shewn that he was *rescued from the deputy of the bailiff of the franchise*; where it ought to have been alleged, that he was rescued from the bailiff himself, or from the sheriff, as 39 H. 6. is; sed non allocatur; for there is diversity between this case, which is an *action upon his case, wherein he shall shew the truth*, as in *rei veritate* it is, and not as it is upon the return of rescues or indictments, which say, that it was done to the sheriff or bailiff himself.

[173] [5. If a sheriff returns that he by force of a capias took the body of J. S. & ipsum habuit in custodia quousque J. D. and J. N. vi & armis, such a day and place, assaulted W. S. and W. N. his bailiffs & prædictum J. S. adtunc & ibidem a custodia sua rescusserunt, & prædictus J. S. seipsum rescussit. This is not a good return; because it is not shewn, that the bailiffs had any authority to intermeddle, and to lay a rescous to be without vi & armis is not good, and the *vi & armis* goes to the first clause only. P. 3 Car. Wilcockes's case adjudged. And the return quashed; for at the common law, where a man should be outlawed or fined, there it ought to be alleged that the offence was vi & armis. 55 H. 6. 8 H. 6. 9. b. Co. 3. Harbert.]

So it was said, that if the sheriff

[6. If the sheriff returns a rescous that J. simul cum B. rescued A. out of his custody; this is no good return against B. because it is not

not any averment that B. rescued him. Nor is it a good return against J. Because it is * *rescufferunt*, which is insensible. M. 14. Car. B. R. per Curiam such return quashed.] returns that the party himself. simul cum

J. S. and J. N. made the rescous, this is not good. Winch. 10. Pasch. 19 Jac. in Homan and Hull's case.

* It was moved to quash a return of a rescous against S. and divers others, who rescued a person taken upon mesne process; because the *rescuers* being particularly named, it was said *rescufferunt*, without adding *quilibet* [eorum] *enadem rescussit*; but Twilden J. being only in Court, held it well enough, it being in the affirmative. Vent. 2. Mich. 20 Car. 2. B. R. Suffil's case.—3 Nelf. Abr. 236. pl. 27. S. C. cites Vent. 2. that it was quashed.

7. 13. Ed. 1. cap. 39. Recites, *That the sheriffs many times make false answers, returning that they could not execute the king's precept for the resistance of some great man, wherefore let the sheriffs beware from henceforth, for such manner of answers redound much to the dishonour of the king.*

And as soon as his bailiffs do testify that they found such resistance, forthwith all things set apart (taking with him the power of the shire) he shall go in proper person to do execution; and if he find his under-bailiffs false, he shall punish them by imprisonment, so that others by their example may be reformed; and if he do find them true, he shall punish the resisters by imprisonment, from whence they shall not be delivered without the king's special commandment. The branch is in affirmation of the common law, 2 Inst. 454. and refers to the exposition upon the said statute

of W. 1. for further reading upon this matter at large.—See for this 2 Inst. 193, 194.

And if perchance the sheriff, when he comes, do find resistance, he shall testify to the Court the names of the resisters, aiders, consenters, commanders and favourers, and by a writ judicial, they shall be attached by their bodies to appear at the king's court. Albeit by the penning of this act it may seem, that the sheriff should

take posse comitatus after complaint made, post queremoniam factam; yet seeing he may take posse comitatus by the common law, he may either take it post, vel ante querimoniam. 2 Inst. 454.

But he must take it after resistance, and not before; for sequi debet potentia justiciam, non precedere. 2 Inst. 454.

*And if they be * convicted of such resistance, they shall be punished † at the king's pleasure; ‡ neither shall any officer of the king's meddle in assigning the punishment; for our lord the king has reserved it specially to himself; because that resisters have been reputed disturbers of his peace, and of his realm.* * See (O) pl. 29.—† That is according to that which shall be upon due

proceeding adjudged coram rege in the king's court of justice. 2 Inst. 454.—* That is as has been said, that the delinquents shall be punished coram rege. in his court of justice; for no man can be punished by absolute power, but secundum legem, & consuetudinem anglie. 2 Inst. 454.—And for more of this matter, see 2 Inst. The Commentaries upon Magna Carta, cap. 29.

8. If the sheriff brings a prisoner towards the king's court, and people rescue him, and the sheriff returns it, the return is not good in time of * peace; for he ought to bring him safe, and may have writ of rescous thereof. Br. Rescous, pl. 27. cites 16 E. 3. and Fitzh. Return de Brevium, pl. 110. *[174] But Brook makes a quere where the rescous is per ignotas;

for then otherwise it seems there. Ibid.

9. If the sheriff returns upon *capias*, that he arrested the defendant at D. and would have carried him to goal, and W. N. rescued him, Br. Lieu, pl. 57. cites S. C.—D. this

69. pl. 29. this is not a good return; for he ought to *shew at what place he*
 cites S. C.— *made the rescous*; for it shall not be intended where the arrest was;
 S. P. And for the other shall be put to answer to the return, and upon this,
 for that reason the party was discharged. the outlawry of the rescous was reversed. Br. Return de Brief,
 pl. 97. cites 10 E. 4. 15.

Mo. 422. pl. 585. Mich. 37 & 38 Eliz. B. R. Anon.—And because a return of rescous shewed
 neither time or place where the rescous was made, the rescuers were discharged. Palm. 563.
 Trin. 4. Car. B. R. the case of the sheriff of Berks.

Upon a latitat awarded against W. the sheriff returned a rescous on such a day, but mentioned
 no place where the rescous was, and adjudged void; because non constat, whether the arrest and
 rescous were within his county and jurisdiction; but if it had *appeared to be done in the county*,
 though he does not say (*infra ballivam meam*) it shall be intended within his bailiwick, though it
 was within a liberty in the same county; and even in such case the rescous had been unlawful;
 because the arrest was good, and no offence, unless to the lord of the liberty. Yel. 51. Mich. 2
 Jac. B. R. Wolfeston's case.—Ibid. 52. cites 11 H. 4. 2. 14 H. 6. Quare impedit.—Jenk.
 125. pl. 53. S. P. that the return is void; because it cannot be traversed for want of a place, out of
 which the jury shall come.

Br. Return
 de Brief, pl.
 88. cites S.
 C.—Br.
 Pleadings,
 pl. 70. cites
 S. C.

10. Note, it was said that a return and a declaration *shall be cer-*
tain to every intent; and therefore because he returned, *rescous made*
at B. by M. by command of N. and did not shew any place of the
command, the return is ill, and the sheriff was amerced. But it is
 said elsewhere, that a *bar* is good, if it be good to a common
 intent. Note the diversity. Br. Count, pl. 58. cites 3 H. 7. 11.

11. If the sheriff returns *mandavi ballivo qui cepit corpus*, and
 that such an one made a rescous; this is not good; but he shall
 say, *mandavi ballivo qui mihi dedit responsum, quod cepit corpus, &c.*
 Mo. 402. pl. 532. Pasch. 37 Eliz. Atkinson's case.

12. A deputy-bailiff of a liberty arrested the party, and delivered
 him to the sheriff's deputy, from whom the rescue was made. In
 action on the case brought for this rescue, judgment was given for
 the plaintiff, which was affirmed in error. Cro. J. 242. in case
 of Kent v. Elwis says a precedent was shewn Pasch. 31 Eliz. Rot.
 248. Burgh v. Appleton.

13. A rescous was returned *against Evanum, alias Jevanum*
Loyd, which appears upon the exigent. The Court held the res-
 cous naught, because he cannot have 2 christian names. Noy. 135.
 Loyd's case.

So where
 the return
 was, that
 they, (viz.)
 A. and B.
 aforesaid,
 the bailiffs
 aforesaid
 &c. and the
 aforesaid
 George Ball
 rescuferunt,
 without
 tunc & ibid.
 Upon that
 the parties
 were dis-
 charged;
 for the first

14. Nota, that the sheriff returned a rescous against 2, viz. the
 father and the son. Against the father for rescuing his son, and
 against the son for rescuing himself; as to the father, the return
 was sufficient and certain, both for time and place; but as against
 the son exception was taken that it was insufficient and uncertain,
 as to the *time* when, and the *place* where the same was done. But
 Dodderidge J. held the return good and certain, and that it shall
 be intended to be that at the same time that the father rescued the
 son the son did there rescue himself; for the return is of the res-
 cous of the father, that he did rescue his son, and this is certain to
 all respects; and the son rescued himself without any limitation of
 the time when; this shall be taken here to be at the same time;
 for this word (and) is here a conjunction copulative, and couples
 those together, to be at one and the same time. Haughton J. said,
 a prisoner may be well rescued by others, and yet he himself not
 have any notice hereof, or be any ways consenting thereto, nor
 guilty

guilty thereof; and it may be so, that one may rescue a prisoner at one time, and that he himself may well rescue himself at another time, and so the same may be at several times; and therefore, because * in the return of the rescous against the son for rescuing of himself, no time is set down in the return when this was done, the return for this cause is insufficient: but by the rule of the Court, the son being present in Court, was for this rescous fined at 40s. and imprisoned, and a further time for the father to appear. 2 Bulst. 137. Mich. 11 Jac. Anon.

ad tunc, &c. referred only to the vulcraverunt, and not to rescusserunt, and the return judged insufficient. Noy. 114. Anon. —

But where the sheriff returned a rescous upon a latitat, and did not return the day of the captiam, all the clerks said the precedents are accordingly, though 4 Eliz. D. 212. and 10 E. 4. 15. were cited e contra; sed non allocatur. Palm. 532. Pasch. 4 Car. B. R. Cane's case. — But Serjeant Hawkins says, it has been adjudged, that if the sheriff returns a rescue without shewing the year and day, it is insufficient, because such return is in lieu of an indictment. 2 Hawk. Pl. C. 235. cap. 25. S. 79. and cites Fitzh. Corone 45. Attachment 1. and * Br. Return de Brief 97. and 3 H. 7. 11. Pl. 3.

* See pl. 9. supra, S. C. but it is not exactly S. P.

15. In a capias utlagatum before judgment, the sheriff returned that J. S. and J. N. rescued the party, &c. and it was moved that the return was not good, for there ought to be additions, by which they may be sued to the outlawry; but Hobart and the Court held this to be good without addition; for no statute nor book will compel the sheriff to give additions in this case. And therefore it was ruled, that the return was good, and the rescuers, which were present, were committed to the Fleet. Winch. 10. East. 19 Jac. Homan and Hull's case.

16. The sheriff returned a rescous, reciting that a latitat was directed to him, and that he made a warrant to his bailiff, who arrested W. &c. and that G. and others rescued him; this is a good return though neither time or place were set forth, where the warrant was made. 2 Roll. Rep. 255. Mich. 20 Jac. B. R. Webb v. Withers.

17. The sheriff returned, quod virtute brevis domini regis mihi directi mandavi ballivo qui anno regni Jacobi nostri (omitting regis) viceffimo & cepit; and that Rous made rescous: this is not good, because it is nonsense. 2 Roll. Rep. 354. Trin. 21 Jac. B. R. Anon.

18. The Court upon the return of a sheriff of a rescous made, and it was moved to quash it, for these exceptions taken to it. 1st. It is said, feci warrantum meum Thomæ Taylor, and does not say that Thomas Taylor was his bailiff. 2dly, He doth not say for what cause he made his warrant; and so it appears not whether it was lawful or not; and upon these exceptions it was quashed. Style 155. Mich. 1649. B. R. Anon.

19. A writ issued to take one S. the sheriff returned, that he made a warrant to 3 bailiffs to arrest him, which they did, and had him in their custody, and that G. and others, vi & armis, in thomam merrice ballivos meos insultum fecerunt, & ad tunc & ibidem, rescued him a custodia ballivorum meorum, & contra voluntates suas. It was objected, that it ought to have been ex custodia vice-comitis, and not a custodia ballivorum, because the sheriff, and not the bailiff, is the proper officer to the Court. It was said, that if an action

action on the case is brought for a rescous, the plaintiff may declare *secundum veritatem facti*; but if the defendant is indicted, it must be *secundum veritatem in lege*, (viz.) that the prisoner was rescued out of the custody of the sheriff himself; but this return was quashed, because it set forth that the prisoner was in custody of 3 bailiffs, and that the defendant made an *assault on one which the sheriff called ballivos meos*. 5 Mod. 216. Trin. 8 W. 3. Strange-way's case.

a Salk. 686.
Pl. a. S. C.

20. It was moved to quash the return of a rescue, which was, *virtute brevis mihi directi feci a warrant to J. S. and J. N. my bailiffs, who by virtue thereof ceperunt & arrestaverunt the defendant, & in custodia mea habuerunt, quousque A. and B. rescusserunt the defendant ex custodia J. S. & N. ballivorum meorum*. And it was quashed; for per Holt Ch. J. the sheriff should either have returned, that the defendant was in his custody, and rescued out of his custody, or that he was in custody of the bailiffs, and rescued him out of their custody, either of which returns had been good; but this return is *repugnant*, viz. that the defendant was in custody of the sheriff, and rescued out of the custody of the bailiffs, ex relatione m'ri Jacob. Ld. Raym. Rep. 589. Trin. 12 Will 3. Anon.

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21. Return of a rescous was thus, *scil. non est inventus in balliva mea*, and then *executio residui istius brevis patet in schedula huic brevi annex*, and that *was of taking and rescous*; but it was quashed for the repugnancy; for per Cur. After non est inventus, there remains nothing for the sheriff to do. But note, upon the return of a rescous the sheriff always concludes, that after the rescous made, the defendant non est inventus in balliva. 5 Mod. 220. Mich. 3 Ann. B. R. The Queen v. Weeks.

See Sheriff. (B) Sheriff. *Delivery over. [By the Old Sheriff to the New one.]*

[1. **T**HE new sheriff is not chargeable with such things are executed before they are delivered over to him by the old sheriff.]

[2. If the sheriff takes a man in execution, and afterwards a new sheriff is made, and after before the old sheriff delivers over, the party who was in execution escapes; the new is not chargeable for this escape, but the old sheriff; for the new is not chargeable with any prisoner before that he is delivered over to him. Tr. 39 El. B. R. is cited sheriff Skinner's case to be so adjudged.]

(C) Return of Sheriff [Or other Officers.] *In the Name of whom it may be.*

Cro. E. 512.
Palmer v.
Pouer, S. C.
but S. P.

[1. **I**F a writ directed to the sheriff be executed, and after a new sheriff is elected, the successor ought to return the writ in such manner, that is to say, *recepit hoc breve predecessori meo directum sic indorsatum*,

indorsatum, &c. Tr. 39 El. B. R. between Palmer and Marsh, does not appear. *per Curiam.*

[2. *So if upon a warrant directed to the baily of a franchise to execute a writ, it be served, and after before return thereof, the baily is removed, and a new baily elected. The return to the sheriff shall not be in the name of the old baily but of the new baily, in the manner aforesaid; for the old baily is a meer stranger.* Tr. 39. El. B. R. between Palmer and Marsh. *Per Curiam* adjudged.]

[3. *But if a writ directed to the sheriff be not executed by him, and nothing done in execution thereof before the sheriff is removed, and another elected, and after the writ is executed, it shall be returned generally in the name of the successor sheriff without any mention of the predecessor.* Tr. 39. El. B. R. between Palmer and Marsh. *Per Curiam.*]

[4. *The same law is of a baily of a franchise.* Tr. 39. El. B. R. *Per Curiam.*]

5. A special *supplicavit* issued out of the Chancery, directed to the sheriff, and to 2 justices of peace, requiring that 2 *vel aliquis eorum* call before them L. and 2 others, and take security for the peace; the 2 justices took a recognizance of L. but the other 2 could not be found, and the sheriff returned this matter into Chancery. Exception was taken that the justices who examined L. ought to have returned the writ, and not the sheriff, who acts not in this case as sheriff but as a commissioner, and therefore those that execute the commission ought to return it; for the king shall not be certified by the sheriff that others certified him, &c. But Doderidge, Haughton, and Chamberlain resolved that the writ was well executed, and the return by the sheriff good. 2 Roll. Rep. 257. 273. (bis) Hill. 20 Jac. B. R. Leonard's case.

adjourned; for by 2 judges the *supplicavit* and recognizance were not well returned by the new sheriff; but Ley Ch. J. was against them. Quere—Palm 322. S. C. says the return was (*viz.*) *executio istius brevis, &c.* Et memorandum that such a day the parties *venerunt coram nobis, &c.* et *invenerunt securitatem, &c.* And that it was resolved by 3 justices *absente* Ley Ch. J. that the execution and also the return was good; and that at another day Ley Ch. J. and Doderidge said, that it is not material who brought the *supplicavit*, or how it came to B. R. For the justices of peace might send it by their servant, or deliver it with their own hands, and return it by another, and it is not material, the record being here for the king, by which the binding is; and it appears *per pais* upon the *scire facias*, that the record is forfeited.—Ibid. 369. S. C. and there Ley Ch. J. held the writ well returned, because the sheriff was one of the commissioners: but Doderidge, and Houghton J. *contra.* But because Ley Ch. J. adhered vehemently to his opinion it was adjourned till Chamberlaine J. was present.

Cro. E. 512. pl. 37. Palmer v. Potter S. C. but S. P. does not appear.

Fol. 548. Cro. E. 512. pl. 37. Palmer v. Potter S. C. but S. P. does not appear.

[177] Godb. 355. pl. 451. Trin. 21. Jac. B. R. S. C. but the return is there mentioned to be by an after-sheriff, and not by him to whom the *supplicavit* was directed; and says the case was

(D) By whom it shall be made.

[1. IF a warrant be directed to the bailies of a franchise to execute a writ, the return of one of the baylies in the name of both is sufficient. Tr. 39. El. B. R. between Palmer and Marsh. *Per Curiam.*]

Cro. E. 512. pl. 37. Palmer v. Potter S. C. but S. P. does not appear.

[2. If a writ be executed by a sheriff, and before return thereof, a new sheriff is elected, he ought to return the writ, and not the old sheriff;

sheriff; because the new sheriff is now the officer of the Court. Tr. 39. El. B. R. Per Curiam.]

3. *Annuity by the Bishop of D. against J. N. the sheriff returned quod clericus est beneficiatus in dioces. de D. non habens laicum feodum; and venire facias clericum issued to the metropolitan inasmuch as the bishop was party; for where it appears by the return that the bishop or sheriff is party, there they shall not serve their own process, quod nota. Br. Return de Briefs, pl. 118. cites 34 H. 6. 29.*

The sheriff may dis-

avow a return made by another

person in his name, *the same term.* Per Holt 12 Mod. 302. in the case of the King v. the Borough of Abingdon.

4. Original returned by one *not sheriff* is irregular, but such irregularity must be complained of the same term, and if defendant appears and does not challenge the original, it is an admitting it. 1 Salk. 295. Andrews v. Lynton.

(D. 2) By whom to be made. Where there are *Joint Officers.*

Br. Return de Briefs, pl. 75. cites S. C.—If 1. **W**HEN *venire facias* issues to the coroners where there are 4, there the return shall not be by 2 only, but by all the 4. Br. Office & Off. pl. 22. cites 31 Aff. 20.

writ be directed generally coronatoribus, and not nominatim to such and such, if one dies, and the survivors return the writ, it is good; for the survivors are coroners. Per Yelverton J. Bull. 219. Pasch. 9 Jac. in the case of Ord v. Morton.

[178]*

Where writ issues to the sheriff of London,

where they have 2 sheriffs, and the

one returns the writ only, this is not good, though the other be dead, for there are not sheriffs. Br. Return de Briefs, pl. 42. cites 14 H. 4. 34.

Br. Office et Off. pl. 22. cites S. C.—Br. Repleader, pl. 13. cites S. C.

3. In *ejectment of ward* they were at issue upon a deed of *darels of imprisonment*, and because the plaintiff was sheriff, *venire facias* issued to the coroners, and 4 returned the writ, and at the *habeas corpus* 3 returned the writ, and exception taken; and upon argument, because it appeared the jury was ready Hank. held this is a good return, because the 4th was dead at the time, &c. and also the plural number coronatoribus is observed. Br. Return de Briefs, pl. 42. cites 14 H. 4. 34.

And one only may sit upon view

of the body of a man killed. Ibid.—And one only may resummons an appeal. Ibid.—But those acts they do judicially, and as judges, but the return they make as ministers, and therefore there seems to be a diversity; *quare.* Ibid.

Br. Office et Off. pl. 19. cites S. C.—Br. Return de Briefs, pl. 15.

5. Writ issued to the coroners of the county of S. to arrest W. N. and J. N. one of the coroners of the county aforesaid returned the writ in his own name only, viz. that he made precept to M. his servant to take him, and he took him, and rescous was made by T. C. and

and K. upon which attachment issued against them, and they were taken, and the attachment returned; and after it was awarded, that the rescuers shall go to the Fleet. But by the reporter this is upon a suggestion made to the Court, and not as upon the return; for it is agreed that the return is not good, quod nota. Br. Return de Briefs, pl. 66. cites 39 H. 6. 40.

6. A record was before 2 justices of the grand sessions in Wales, and it was returned by one only, without shewing that the other was dead, and this being excepted to, it was answered, that they are justices by patent, and that the record was as much before the one as the other, and therefore well enough. Skin. 11. Mich. 33 Car. 2. Morgan v. Vaughan.

Raym. 456. S. C. but not S. P.

(E) How it may be. Not against the Return before.

[1. IF the sheriff returns upon the venire facias 12 jurors, he cannot upon the distringas return that one has nothing, because it is against the first return; for if he had at the first return though he has aliened, yet it is chargeable with the issues. 19 H. 6. 38.] The return of the nihil was by a succeeding sheriff, and per tot. Curiam he was amerced; for he must ensue the first return. For if any juror has aliened his land, or if the juror has estate conditional, and the condition is performed, and the feoffor enters, or such like; in these cases the sheriff ought to return the special matter, and conclude, and so nihil habet, and if he was never sufficient, he shall have action of descent against his predecessor. Br. Return de Briefs, pl. 49. cites 19 H. 6. 38.——But Fort. and Markham agreed, that if the defendant be returned sufficient, and after nihil, this is well; for the party might have capias and exigent against him; contra against the juror. Br. Return de Briefs, pl. 49. cites 19 H. 6. 38.——Br. Action sur le Case, pl. 53. cites S. C.

[2. So he cannot return upon the distringas, quod mandavit ballivo as to one juror, qui nullum responsum dedit, (it seems because it is against the other return.) 19 H. 6. 48.] The sheriff was amerced 100 shillings because he returned upon a distringas juratores, all distrained except one, and as to him, quod mandavit ballivo, &c. qui nullum dedit responsum; for if he may be permitted to return so, then he may make such another return another time, and infinite delay, and therefore Brooke says, it seems that in this case he ought to have entered the franchise and served the writ himself for the default of the bailiff in not answering. Br. Return de Briefs, pl. 50, cites 19 H. 6. 48. & 67.

[3. But if the land be recovered by elder title in the mesne time he may return it with concluding, and so nihil habet. 19 H. 6. 38. b.] Br. Return de Brief, pl. 49. cites S. C. & P.

[4. So if the juror had the land per antea vie, and cesty que vie is dead in the mean time between the returns. 19 H. 6. 39.]

[5. So if he had land in right of the feme, and she is dead in the mean time. 19 H. 6. 39.] Though she be dead without issue.

Br. Return de Brief, pl. 49. cites S. C.

[6. At the grand distress sicut alias, or pluries, the sheriff cannot return without cause, that the party had nothing by which he might be distrained, where he had returned before in another writ, that he was distrained by so much, &c. 22 Aff. 80. But quære.] He must return special matter where the party was returned

summoned before. Quære. Br. Return de Brief, pl. 110. cites S. C.

[7. But

Br. Return
de Brief,
pl. 110. cites
S. C.

[7. But with cause sufficient he may return it. 22 Aff. 80.]

[8. As the sheriff may return *quod nihil habet in balliva sua præter exitus suos prius forisfactos*. 22 Aff. 80.]

9. In *præcipe* quod reddat the tenant vouched, and the sheriff returned the vouches summoned, and after at the grand cape he returned that he had nothing by which he might be summoned, neither lands or tenements which might be taken into the hands of the king; and it was adjudged a good return. Br. Return de Brief, pl. 7. cites 9 H. 6. 41.

10. Where the bailiff makes insufficient return, the sheriff may return, *quod nullum dedit responsum*; for insufficient answer is as no answer. Per Cur. Br. Return de Briefs, pl. 89. cites 5 H. 7. 27.

(F) In what Cases the Successor Sheriff shall be bound by the Predecessor.

• Br. Return de
Brief, pl.
49. cites S.
C.

[1. **I**F the predecessor returns upon a venire 12 jurors, the successor upon the distringas cannot return, that one juror *nihil habet*; for if he had at the return of the venire facias, the same land is yet chargeable with the issues though he has aliened it, and the successor shall be bound by the return of the predecessor that he had at the venire facias; and if this be false he may have *writ of *disceit* against the sheriff. 19 H. 6. 38. Curia.]

Sec(E) pl. 2.

[2. So the successor cannot return the distringas as to one juror, *quod mandavi ballivo talis libertatis qui nullum responsum dedit*. 19 H. 6. 38. b.]

[180]
Fol. 459.

(G) What shall be a good Return against the Admittance of the Party.

[1. **U**PON an *habere facias seisinam* upon a judgment against J. S. it is no good return for the sheriff to return, that J. S. had nothing in the land, nor was tenant. 17 E. 3. 66. b.]

[2. In an action of debt against an heir, if the defendant pleads, that nothing descended to him but an house in B. upon which judgment is given for the plaintiff, and quia ignoratur of what value the house was, writ issues to the sheriff to make enquiry of the value, and to make execution accordingly; and the sheriff returns, that the house was sold by the defendant before the writ came to him; this is not a good return. H. 7 Ja. B. between Gollon and Bennet. Per Curiam.]

God. 178.
pl. 230.
Mich. 8 Jac.
C. B. S. C.
but not S. B.

[3. If in an action of debt against an executor the defendant confesses the action, by which a *feri facias* issues, the sheriff may return *nulla bona, &c.* For this stands with the judgment inasmuch as he confesses the action, but not that he has goods. Dubitatur. M. 8. Ja. B. between Newman and Babington.]

And in tref-
pass in D. if
the defend-

4. Debt against executors, who pleaded *plene administravit*; and it was found that they had assets; by which the *feri facias* issued to levy

levy the sum of the goods of the deceased. The sheriff returned mandavi ballivo libertatis de K. qui mihi respondit, quod exec. non habent aliqua bona testatoris, which was contrary to the verdict. Keble. said, yet the return is good; for verdict between party and party shall not conclude the sheriff: and if the party will confess, yet the sheriff shall not be by this concluded. Br. Return de Briefs, pl. 87. cites 3 H. 7. 12.

ant confesse that there is such a will, yet at the venire facias the sheriff may return, that there is no such will in

the same county. Ibid.——But Curia e contra and that he cannot return that which is contrary to the verdict or confession; and in such case the sheriff may return decessaverunt. Ibid.—S. P. Per Cur. that the return is not good. Br. Return de Briefs, pl. 89. cites 5 H. 7. 27.——For per Wood, in replevin it is no return, that he has no such beasts; but may return, quod averia sunt elongata, or quod nullus venit ex parte querentis ad demonstranda averia. Ibid.——And in writ ad deliberand. in detinuo, it is no plea, that there are no such goods. Ibid.——And in habere facias sefnam it is no return, that no such land; for upon such return the plaintiff cannot have due execution. Ibid.——And in the principal case he might have returned, quod exec. decessaverunt bona, or ea elongaverunt, and all the first process was served by the sheriff, without returning mandavi ballivo, and the sheriff might have returned execution against the executors upon another record of later time; and per Cur. the return is not good. Ibid.

(G. 2) Return of Nihil. In what Cases it is Peremptory.

1. **I**N scire facias by executors, upon recovery of damages by their testator, the defendant was returned nihil, and the plaintiffs had execution by award. And so note, upon a judgment the plaintiff shall have execution upon the first nihil returned. Br. Scire facias, pl. 96. cites 21 E. 3. 13.

It is the course in C. B. that in scire facias upon recovery of debt, trespass, or

annuity at the first nihil returned, the plaintiff shall have execution, per Brian. Br. Scire facias, pl. 162. cites 2 H. 7. 3.——In Scire facias upon a recovery of debt or damages, the first return of nihil against the defendant is peremptory, if he makes default. Br. Peremptory, pl. 63. cites 24 H. 8.

2. In account, the defendant was outlawed, and got pardon, and had scire facias against the plaintiff, who was returned nihil; and the pardon was allowed upon a nihil returned, and he went quit. Br. Return de Briefs, pl. 109. cites 21 E. 3.

§[181] Br. Scire Facias, pl. 98. cites 21 E. 3. 20.

3. * But by 40 E. 3. Sicut alias shall issue, and the like 19 E. 3. Ibid.

S. C.——Scire facias upon charter

of pardon by the defendant, who is outlawed against the plaintiff, if the sheriff returns nihil, and upon the alias similiter, this is peremptory, and the charter shall be allowed, if the plaintiff does not come. Br. Peremptory, pl. 65. cites 48 E. 3. 1. 3.——Br. Averment contra, &c. pl. 6. cites S. C.——S. P. Br. Scire facias, pl. 192. cites 22 H. 6. 7.——Two nibils returned upon scire facias upon charter of pardon, countervails scire facias. Br. Return de Briefs, pl. 101. cites 21 H. 6. 3.——* Orig. is (Tantum.)

4. Where it is returned, that a veior nihil habet, &c. scil. where process is made against the veior to testify the view in the first recovery, or if process shall be made against a witness to testify the making of the deed in which he is witness, if it shall be returned nihil habet, &c. and testatum est. that they have in a foreign county, the assise shall not stay, nor process shall not be made in the foreign county, but the trial shall proceed by the jury; quod nota. Br. Process, pl. 99. cites 29 Ass. 70.

5. Three

5. *Three nibils* returned in *ven. fac.* upon an *audita querela* is peremptory, and the defendant who brought the *audita querela* shall go quit. Br. Peremptory, pl. 65. cites 48 E. 3. 1. 3.

6. In *appeal of death* the defendant removed it out of the county by writ to the sheriff and coroners, to send it into B. R. who sent the record; and because the plaintiff was *sine die* before the sheriff and coroners, *scire facias* issued against the plaintiff, to maintain the appeal if he would, returnable Quind. Hill. and the sheriff returned *nihil*, by which *sicut alias* issued, and the sheriff returned *nihil*, and *pluries* issued. And so see the first *nihil* there is not peremptory. Br. Peremptory, pl. 63. cites 48 Aff. 3.

7. In *covenant to levy a fine*, the sheriff returned *nihil*; and it was said that it was ill, because he *may summons him in the land in the writ* of which the fine shall be levied; *quod quære*, because it may be that he is not thereof tenant, &c. *sicut alias* shall issue without amercement of the sheriff. Br. Return de Briefs, pl. 122. cites 10 H. 6. 12.

8. In *quare impedit* the sheriff returned *nihil* upon the summons, and upon the attachment, and upon the distress: and per Danby, Paston, Newton, Cott. and Godred, the plaintiff shall recover by the intendment of the statute; but *contra* Marten and Strange of *nihil* returned in *quare impedit*. Br. Return de Briefs, pl. 101. cites 11 H. 6. 3.

9. And upon *nihil* returned in *assise*, the assise shall be taken. Br. Return de Briefs, pl. 101. cites 11 H. 6. 3.

10. And executor who first comes at the 3d *capias*, shall answer. Br. Return de Briefs, pl. 101. cites 11 H. 6. 3.

11. And per Marten, if the sheriff returns *nihil* in writ of *mesne*, yet process of forejudger shall be. Br. Return de Briefs, pl. 101. cites 11 H. 6. 3.

12. And per Danby, if *nihil* be returned in writ of *ward*, writ of *waste*, or in writ of *admeasurement of dower*, or of *pasture*, the plaintiff shall have such judgment as if the writs had been returned served. Br. Return de Briefs, pl. 101. cites 11 H. 6. 3.

13. In *detinue*, the defendant prayed garnishment, because the writings were delivered to him upon condition, &c. the sheriff returned *nihil* upon the *scire facias*. And per Heuster prothonotary, he ought to have *testatum* in such county where the garnishee has been warned; for the plaintiff shall not have livery of writings upon the return of one *nihil*, as he shall have upon the *scire facias* upon charter of pardon after outlawry; for there the plaintiff may have a new original, but the garnishee shall not have action, and so similiter here if judgment pass against him of the same thing; *queræ*; for non adjudicatur. Br. Scire facias, pl. 234. cites 11 H. 6. 51.

[182] 14. If a man comes by *capias utlagatum*, and pleads in reversal of the outlawry, and *scire facias* issues against the plaintiff to maintain the outlawry, and he is returned *nihil*, and the like at the *alias scire facias*, the outlawry shall be reversed, if none for the king maintain it, and if the king's attorney will confess the exception, the outlawry shall be reversed immediately. Br. Scire facias, pl. 192. cites 22 H. 6. 7.

15. In

15. In error, if the plaintiff be nonsuited after the year, the plaintiff in the first action shall have *scire facias*, and the defendant ought to be warned, or two *nihils* returned before execution shall be awarded. Br. *Scire facias*, pl. 174. cites 5 E. 4. 6.

(H) *What shall be good Excuse of the [not] doing of the Command. Default of the Party.*

[1. **U**PON an *habere facias seisinam* it is a good return to excuse the sheriff that he was always ready to deliver seisin, and appointed divers times in certain for the party to come to the land, and receive seisin, at which time he himself was ready to deliver seisin, but none came for the party to receive it. P. 15 Ja. B. R. *Floyd v. Bethill. Per Curiam.*]

Roll. Rep. 51. pl. 21. Trin. 12 Jac. B. R. S. C. but not S. P.—Ibid. 200. pl. 2. Trin. 13 Jac. B. R.

S. C. but not S. P.—Ibid. 322. pl. 30. Hill. 13 Jac. B. R. S. C. but not S. P.—Ibid. 420. pl. 8. Mich. 14 Jac. B. R. S. C. but not S. P.—Bridgm. 56. S. C. but not S. P.

[2. Upon an execution, scil. a *fieri facias*, if the sheriff returns that he took certain beasts of the party to sell for the debt, and J. S. rescued them from him, this is not a good excuse of the sheriff it being upon execution, in the serving of which he has *posse comitatus*. P. 15 Ja. B. R. *Strange's case. Per Curiam* adjudged that the return is insufficient.]

Goods were levied by the sheriff's bailiff by warrant on a *fieri facias*, and the sheriff returned that

they were rescued from the bailiff by A. contra voluntatem of the bailiff. Richardson, Hutton, and Henden held that no rescous can be on a *fi. fac.* for that lies only on a *capias* against the person himself; but that the party injured may have an *action on the case*; but Yelverton contra. Hec. 145. Trin. 5 Car. C. B. *The sheriff of Surry v. Alderton.*—So where the defendants were prosecuted in the Crown-Office for a rescue of a coach and harness returned upon a *fieri facias*, and upon appearance of the parties the return was quashed, and they discharged, because not good on a *fieri facias*. Show. 180. Mich. 2 W & M. *the King v. Bill & al.*—It was moved to quash the return of a rescous upon a *fieri facias* as a bad return, and a rule was made to shew cause. Barns's Notes, 304. *The King v. Baldwin & al.*—On rule to shew cause, why an information should not be granted against the defendants for a rescue. Probyn J. said, that the rescue ought to be returned, before this court will do any thing in it; but the counsel informed them, that this was a rescue of goods upon a writ of execution, for which reason the sheriff ought to have maintained his possession, and cannot return a rescue. Accordingly the Court made the rule absolute as to Paston, and discharged it as to the others. (Ch. Just. absent.) 2 Barn. Rep. in B. R. 58. Mich. 5 Geo. 2. 1731. *Decmes v. Paston & al.*

(I) Not good, for not excusing all the Time of the Command.

[1. **I**F upon an *habere facias seisinam* the sheriff returns, that he was ready at the place where, &c. such a day to have delivered seisin, and gave notice to the party, that he should be there at the day to accept it, and none came for him at the day; this is not a good return without excusing himself for the time after the day; for he might have done it after the day before the return. P. 15 Ja. B. R. *Floyd and Bethill. Per Curiam.*]

See (H) p. 16 S. C.

See(H)pl.1.

[2. So in the case aforesaid he ought to excuse himself of the time before the day aforesaid, otherwise the return is not good; for perhaps he was requested before, and would not perform it. P. 15 Ja. B. R. Floyd and Bethill, per Croke and Houghton against Mountague and Doderidge; for they said that the sheriff cannot always attend. Dub.]

(I. 2) Writ not served. Excuse. What.

Br. Cuf-
toms, pl. 23.
cites S. C.—

But it is no
return that
the de-

1. **I**n *nativo habendo*, the sheriff of London returned, that if a villein abide in London by a year and a day, he shall not be drawn out; and the best opinion was that it is a good return. Br. Retorn de Briefs, pl. 46. cites 7 H. 6. 32. and 8 H. 6. 3.

Br. Cuf-
toms, pl. 23.
cites S. C.

2. And return, that *attaint does not lie in London* is good. Br. Retorn de Briefs, pl. 46. cites 7 H. 6. 32 and 8 H. 6. 3.

3. And that if writ issue to the *sheriff of Chester* that it is a good return that they have *County Palatine* and writ of the king within themselves, and that time out of mind writ of the king was not served there, by which they cannot serve the writ. Br. Retorn de Briefs, pl. 46. cites 7 H. 6. 32. and 8 H. 6. 3.

4. And in *replevin* it is a good return that the defendant claims property. Br. Retorn de Briefs, pl. 46. cites 7 H. 6. 32 and 8 H. 6. 3.

5. And it is a good return in several writs, *quod mandavi ballivo*; and yet in those cases the writ is not served, but it is an excuse for why the sheriff shall not serve it. Br. Retorn de Briefs, pl. 46. cites 7 H. 6. 32 and 8 H. 6. 3.

6. And in writ of *habere facias seisinam* it is a good return that at the day of the writ purchased, and the day of the judgment, and always after he himself was tenant, so that he could serve the writ if he did not do a tort to himself; by diverse. Br. Retorn de Briefs, pl. 46. cites 7 H. 6. 32 and 8 H. 6. 3.

7. And it is a good return upon a *capias* that the party committed felony and took to the church, which privilege he cannot break, and yet the writ is *capias si inventus fuerit in balliva tua*. Br. Retorn de Briefs, pl. 46. cites 7 H. 6. 32 and 8 H. 6. 3.

So where it
is written to
the bishop to
certify ma-
trimony or

8. It is no good return for the sheriff, that the party would not give his costs or fee, and therefore he did not execute the writ. Br. Retorn de Briefs, pl. 10. cites 34 H. 6.

bastardy. *contra* upon inquiry *de jure patronatus*; for there he is judge and not minister; note the diversity. Br. Ibid.—Br. Fees, pl. 1. cites 34 H. 6. 38. S. C.

9. Where an attachment for contempt issues against the mayor of W. because he did not return a *certiorari*, nor the *alias*, nor the *pluries*, and he is taken, and comes in ward, he may traverse that

na writ was delivered to him prout, &c. Quod fuit concessum.
Br. Traverse per, &c. pl. 206. cites 2 E. 4. 1.

* (K) What shall be a good Return. [In respect of the Words.] See Replevin (O. 2.)

[1. IF a writ be *scire facias per probos & legales homines*, and he returns *quod scire fecit* by such an one and such an one, and does not say *probos & legales homines*, yet it is good. 8 H. 6. 27. b.] This was in the return of garnishment and exception

was taken, but non allocatur. And it is not material where the defendant appears. Br. Return de Brief, pl. 48. cites 8 H. 6. 27.

In *scire facias* the sheriff returned the writ served, and the party warned prout breve exigit, and the defendant took exception because it did not say *probos & legales homines*. Per Pilsot, it is not material when you appear, but upon default the party may have writ of descit, and aver that they were outlawed, so that they were not *probi & legales homines*. Quære it by those words prout breve exigit, &c. it shall not be intended to be *probi homines*. Br. Return de Briefs, pl. 12. cites 33 H. 6. 31.

[2. So it is upon a summons in a writ of debt. 8 H. 6. 27. b.]

[3. In a *scire facias* if the sheriff returns the writ served, that is to say, *scire * feci* the party defendant by name *essendi secundum tenorem brevis*, and says not where, nor what to do, yet it is good. 18 E. 3. 12. b.] * Fol. 460.

[4. In a *scire facias* returnable in bank, if the sheriff returns, *scire feci, &c. quod sit coram vobis ad faciendum quod breve requirit*; though *vobis* has relation to the king, whereas the garnishment ought to be *coram justiciariis*, yet [it is] good; because the words, *ad faciendum quod breve requirit* comprehends all. 29 E. 3. 33. Adjudged.]

[5. In *attaint* if a *scire facias* issues to warn the petit 12. one whereof is called *Miles de Beacham, Knt.* and the sheriff returns, that he has inquired of them, &c. and that those are the names of them, and that *Miles de Beachamp* is dead, though he does not name him knight, yet the return is good; for it appears upon the whole return, that it is the same man. 34 Ass. 6. Adjudged.] S. P. Knivet said, that it may be intended another person, and yet the return was awarded good; for

it shall be intended the same process. Br. Return de Briefs, pl. 76. cites S. C.

[6. If a *scire facias* issues against *Miles B. knight*, and the sheriff returns, *scire feci Miles intranominato*; this is a good return without more; for the word (*infranominato*) serves throughout. 34 Ass. 6.]

7. In *præcipe quod reddat* the tenant cannot render the land to the demandant in pais, nor in debt quod reddat, &c. It is no return in one or the other, that the tenant or defendant has rendered the land or debt. Br. Return de Briefs, pl. 84. cites 2 H. 7. 8.

8. *Scire facias* against 3 several tenants, the sheriff returned, *quod scire feci* to the 3 by such, &c. *Quod sint, &c. Modo & forma prout breve in se exigit & requirit*; and well by award, notwithstanding that he did not return several garnishments; for those words, And in such a *scire facias* the return was awarded good, *ad faciendum prout ipsum*

breve requirit, &c. words, modo & forma prout, &c. tantamount, &c. Br. Return de Briefs, pl. 28. cites 2 H. 4. 13.
Br. Return de Briefs, pl. 28. cites 2 H. 4. 13.

[185] 9. The sheriff returned *capias, quod mandavi A. B. Ballivo libertatis archiepiscopi de Beverlac. cui returnum inde restat faciend. qui mihi respondit quod cepit corpus, &c. sed illud hic habere non potest eo quod Giltbernams est infra villam de Beverlac.* And it was said, that he ought not to have returned *cepi corpus* but where he can have the body at the day, and that if the sheriff takes a prisoner in Westminster, and he takes sanctuary, this shall not be any return for the sheriff, inasmuch as it is his folly; and yet the return awarded good per judicium. And it was said to him, that he might have proclaimed at the gate of the sanctuary according to the form of the statute. Br. Return de Briefs, pl. 29. cites 2 H. 4. 15.

10. *Sci. fac. upon writ of error in B. R. was, viz. sci. fac. hered' & terræ tenent' separatim ad essend' &c. si sibi viderint expedire;* and the sheriff returned, *quod scire feci J. de B. & A. Uxori ejus tenants of so much, & R. de H. tenant of so much, separatim;* and exception was taken, inasmuch as the baron and feme cannot be warned separately, et non allocatur exceptio illa; nota. Br. Return de Briefs, pl. 30. cites 3 H. 4. 19.

11. *Capias of the death of a man:* the sheriff returned, *quod breve adeo tarde sibi venit quod illud exequi non potuit propter brevitatem temporis;* and the return awarded good. Br. Return de Briefs, pl. 34. cites 8 H. 4. 21.

Ld. Raym. 12. *Scire facias* the sheriff returned, *quod scire feci E. K. prout Rep. 21. istud breve in se exigit & requirit;* and did not say, *infranominat' Mich. 6 W. E. K. and well. Per Cur.* And adds, nota that those words & M. WIL- (prout breve exigit) &c. amount to *infranominatus*, or to *infra- son v. LAW, cites scriptus;* quod nota. Br. Return de Briefs, pl. 64. cites 1 H. 6. 6.
S. C. and says, if there is the substance it matters not if there is not the express form.

13. And where the sheriff returns, *quod mandavi ballivo libertatis de S. and does not say, ballivo J. N. libertat. suæ de S.* this is a good return. Per Martin, Cokayne, and Babb. justices; contra Hales J. and that he ought to shew that he is lord of the franchise; and yet he was awarded to answer, and save his exception, &c. Br. Return de Briefs, pl. 64. cites 1 H. 6. 6.

Br. Attach- 14. The sheriff returned *the baron attached in assise, and the ment, pl. 4. feme nihil;* and the best opinion was, that she shall be attached by cites S. C. the goods of the baron, and a monk by the goods of the abbot; for the one shall answer for the other, and the one is amenable by the other; quære inde: for it was adjourned. Br. Return de Briefs, pl. 45. cites 7 H. 6. 9.

15. The sheriff returned, *quod non invenit partem, &c.* by which upon exigent he was outlawed, and assigned it for error, and therefore that was adjudged for error; quod nota. Br. Return de Briefs, pl. 43. cites 9 H. 6. 12.

16. In

16. In *præcipe* quod reddat if the tenant vouches, and the sheriff returns upon the summons ad warrantizandum, quod nihil habet nec est inventus, &c. this is a good return, and yet contrary in formedon. The diversity seems inasmuch as in the formedon he may summon him in the land demanded, be he tenant thereof or not, but it may be that the vouchee has no land. Br. Return de Briefs, pl. 62. cites 14 H. 6. 20.

17. And upon writ of view it is a good return, quod nullus venit ex parte petentis ad demonstrandum sibi terram; for the tenant is bound to know the sheriff, and the sheriff is not bound to know or inquire the land; and the same of a sheriff of the franchise: and this is for the dispatch of the party. Br. Return de Briefs, pl. 62. cites 14 H. 6. 20.

18. The sheriff returned quod mandavi A. B. ballivo libertatis ducatus Lancast. &c. Qui habet returna omnium brevium infra libertatem prædictam qui sic respondit. Quod scire feci præfato R. C. et quod sint, &c. Billing said, the return is not good; for it should be ballivo libertatis ducis Lancast. For the duchy has no capacity to have liberty. And yet, because precedents were shewn, mandavi ballivo libertatis as above, & mandavi ballivo libertatis sancti Edmundi de Bury, & mando ballivo libertatis de Alta Pecco, & mandavi ballivo libertatis ducis Lancast. it was awarded a good return. Br. Return de Brief, pl. 11. cites 33 H. 6. 20.

19. Scire facias Laurentio both magistro Aulae de B. in Cant. et scholaribus ejusdem was brought in Norfolk upon recovery of annuity, and the sheriff returned, quod scire feci magistro, &c. and therefore a void return per Cur. by which in another scire facias he returned scire feci Laurencio B. magistro et scholaribus, and Laurence B. came and pleaded to the writ, that he is not master. Br. Return de Brief, pl. 14. cites 34 H. 6. 49. [186]
Br. Corporations,
pl. 6. cites
34 H. 6. 14.
49. S. C.

20. If a writ be returned responsio vicecomitis S. and does not shew the name of the sheriff; this is no good return. Br. Return de Brief, pl. 54. cites 9 E. 4. 19. per Jenny.

21. Outlawry was returned, that at the county [court] held at F. in the county of Somerset F. N. exactus fuit et non comparuit, and a good return per Rode, Fairfax and Husley, though he did not say at the county [court] of Somerset held at F. in the county of Somerset. Br. Return de Brief, pl. 127. cites 11 H. 7. 10.

22. A man returned, quod virtute præcepti, &c. and not brevis, and yet well. Br. Return de Brief, pl. 128. cites 16 H. 7. 16.

23. Captus est is a good return of a capias. Ld. Raym. Rep. 21. Mich. 6 W. & M. Wilson v. Law, cites Kitchin, 258.

(L) What shall not be a good Return. For Uncertainty.

[1.] IF fieri facias de bonis testatoris against executors, if the sheriff returns that they have not any goods in balliva sua after the delivery of the writ prout ei constare poterit; this is not a good return; But he may

return, that the executors have cloigned the goods, or *that the goods are cloigned, &c.* turn; for he ought to take notice whether they had goods or not, and so returned it. 9 H. 6. 57. b. Curia.]

Br. Return de Briefs, pl. 8. cites S. C. [2. So if a *capias* comes to the sheriff to take a man, it is not [a good] return, that he was not found within his bailywick after the delivery of the writ prout ei constare poterit; but he ought to return expressly *quod non est inventus*. 9 H. 6. 57. b. Curia.]

Br. Retorne de Brief, pl. 70. cites S. C. — S. P. Ibid. pl. 68. cites 26 Aff. [3. In *assise* it is a good return, that the baily is attached, &c. though he has not returned that the tenant was not found; for by the return that the baily is attached, it is included that the party is not found. 28 Aff. 40. adjudged.]

33. — But where he returns that the defendant *nihil habet, &c.* he shall say further *quod non habet ballivos nec ballivum, nec est inventus in eadem, &c.* Ibid.

See (H) pl. 1. [4. If upon an *habere facias seisinam*, the sheriff returns that the party, who ought to take the seisin, *non prosecutus est breve*; this is not good for the uncertain intendment thereof, and the coming to the sheriff to have seisin is not properly a prosecution of the writ. Dubitatur P. 15 Ja. B. R. Floyd and Bethill; Croke and Haughton against Mountague and Doderidge.

[5. In a *replevin* upon the *causam nobis significes*, if the sheriff returns that the beasts cannot be delivered; because *visum inde habere non potuit*, this is not good; because he does not say *quod accessit ad locum*; for peradventure, he could not have the view; because he did not come there where the beasts were. 2 E. 3 54. b. adjudged.]

[187] 6. In waste the sheriff returned, *quod cepit inquisitionem die sabbati proxim. apud R.* and because he did not shew what sabbath, therefore the sheriff was amerced, and a new writ awarded. Br. Retorn de Brief, pl. 17. cites 4 E. 3. 20.

7. *Exigent* issued to the sheriff of London against J. S. de D. in the county of Essex; gentleman, and proclamation to the sheriff of Essex, who returned the writ, scil. *Quod virtute istius brevis proclamari feci at such a county, held such a day*, and does not say what year, &c. that J. S. se reddidit to the sheriff of Kent, where it should be to the sheriff of London, and therefore an ill return, per Cur. because the year is wanting, and it was sheriff of Kent for sheriff of London. Shelly said, the sheriff shall be amerced, but Fitzh. J. said, no; for the writ was returned in another term, and the usage is to amerce the sheriff the same term, and if not, he shall go quit; *quod nota*, for clear law; *quod non negatur*. Br. Return de Briefs, pl. 3. cites 27 H. 8. 29.

D. 199. pl. 54. Pasch 3 Eliz S. C. & P. accordingly. — And. 51. pl. 157. Hill. 2. and Pasch. 3 Eliz. S. C. accordingly. 8. In trespass, the sheriff returned in C. B. that the defendant was attached *per catalla ad valentiam 10l.* It was adjudged a void return; for he ought to return that he was attached by one beast or chattel certain, and name them, so that they may be forfeited; for upon such general return, none of them can be forfeited. Cro. E. 13. pl. 7. Hill. 25 Eliz. C. B. Lawrence v. Netherfale.

(L. 2) *Sufficient.* Return, *what* shall be said to be.
And made good by Intendment, in what Cases.

1. **I**N *premunire* the writ was returned warned, and did not say by what time, where the statute is, that he shall be warned by two months, &c. and yet well per Cur. For it shall be intended, that it is well served according to law; for other writ ought to be served by 15 days before the return, and yet no mention is thereof in the return, and if the sheriff does not warn him, or serve the writ as he ought, if the party be damnified, he may have writ of deſceit. Br. Retorn de Briefs, pl. 56. cites 39 E. 3. 7. Br. Action sur le Case, pl. 67. cites S. C.

2. In *admeasurement of dower* the sheriff returned that the feme had more than she ought by 40s. a year; this is no good return; for he ought to return two parts by themselves, and the third part by itself and their values, and let the Court adjudge their values; nota. Br. Retorn de Briefs, pl. 119. cites 44 E. 3. 11.

3. If the sheriff returns in a pannel, *Johannis D.* where it should be *Johannes D.* yet this is good; for false Latin is not material in a return. Br. Retorn de Briefs, pl. 105. cites 2 H. 4. 8.

4. In writ of right a writ issued to the sheriff to return 4 knights to chuse the grand assise returnable such a day; and the sheriff returned *quod non fuerunt milites sed burgenses*, by which another writ issued returnable presently; whereupon the 4 knights were demanded, who came to the bar *gladiis cinctos*, &c. And so it seems that he may return them knights, though they are not knights. Br. Retorn de Briefs, pl. 106. cites 7 H. 4. Br. Droit, pl. 6. cites 7 H. 4. 3. 20. S. C.

5. In *trespass* the defendant was condemned, and *ca. sa.* issued, and after exigent against him by name of *J. S.* &c. and the sheriff returned that *J. S.* rendered himself to him in full county, where there were the father and the son of the same name; and therefore ill; for where there is * [no] addition, it shall be intended the elder; and in truth he who rendered himself was the father, and therefore the sheriff was amerced, and *distringas ad habendum corpus* awarded, inasmuch as he had returned that the defendant reddidit se, &c. Br. Retorn de Briefs, pl. 107. cites 7 H. 4. 11. * All the editions are without the word (no). [188]

6. In *homine replegiando*, it is a good return for the sheriff to say that the defendant claims the plaintiff to be his villein; per quod ipse ulterius facere inde non potest, &c. Br. Retorn de Briefs, pl. 104. cites 8 H. 4. 2.

7. The sheriff who returned a *fieri fac.* against executors, that they had sold the goods, was amerced; for he ought to have taken to the value, &c. of the goods of the executors. Br. Retorn de Briefs, pl. 41. cites 14 H. 4. 12. And it is no return. that all the executors, except one had nothing: for

he ought to have made execution of that which was in the hands of this one executor. *Ibid.*

Br. Charters
de Pardon,
pl. 2. cites
S. C.

8. Debt by W. abbot of D. till the defendant is outlawed, and sued charter of pardon, and the sheriff returned that W. abbot is deposed, *ita quod ipsi ut W. abbati scire fac. non potuit juxta formam brevis*, and a good return, per judicium, and the charter allowed; for it tantamounts to mortuus est, and so a civil death; for a dead person cannot be warned. Br. Return de Briefs, pl. 4. cites 2 H. 6. 5.

But upon a
capias,
tarde is no
return;
quare inde,
because the
use is con-
trary.

Ibid.—
But it seems
upon a *lates*,
tarde is no return. Ibid.

9. Forger de faits found for the plaintiff; it was pleaded in arrest of judgment that *distress with Decem. tales* was awarded against the jury, and the principal jury was returned *tarde* upon the distress, and the tales served: et per Cur. The return was awarded good; for where issues shall be returned, as upon distress, the sheriff ought to have time to know their land. Br. Return de Briefs, pl. 52. cites 21 H. 6. 51.

10. In *scire facias* against a chaplain upon recovery in *quare impedit*, the sheriff ought not to return *quod clericus est beneficiatus*, &c. For this shall not be returned but where distress or *capias* issues, which is coercive, and here is nothing to do but to warn him; and therefore by some, the sheriff shall be amerced; but it is a good return that he is clericus beneficiatus, &c. and that non est inventus, &c. For then he cannot be summoned if he is not found, or has no lay fee. Br. Return de Briefs, pl. 124. cites 32 H. 6. 11.

11. In writ of view, it is a good return, *quod nullus venit ex parte petentis ad ostendendum sibi terram*. Br. Return de Briefs, pl. 125. cites 32 H. 6. 27.

So in *præ-
cipe quod
reddat*, that

12. In *scire facias* it is a good return that the party is dead. Br. Return de Briefs, pl. 125. cites 32 H. 6. 27.

the tenant is dead. Ibid.—So upon *corpus cum causa*. Ibid.—But it was doubted if death be a good return upon *capias* or *exigent*. Ibid.

The sheriff in assize cannot return that the defendant is dead; for there are not any words in the writ, to warn the defendant. Br. Return de Briefs, pl. 2. cites 18 H. 8. 5.

13. In *præcipe quod reddat*, they were at issue upon release of the demandant in which were witnesses; the sheriff returned the pannel, and that the witnesses were dead; and the tenant said that they were alive, and prayed that the sheriff should be examined of his return; and so he was after the day, and said that it was not made by him or his under-sheriff, but by a clerk, and that there is no such visne, and that two of the witnesses are alive, and are warned; and the Court accepted the return of the two witnesses, but were in doubt of the return that there is no such visne; for the best opinion in this case was, that the sheriff shall return a pannel of the body of the county, and not that there is no such visne. Br. Return de Briefs, pl. 57. cites 37 H. 6. 11.

[189] 14. In *scire facias* against a parson, to have execution of an annuity recovered against him, the sheriff returned, *quod mandavit ballivo*, &c. Qui respondit, that the parson before the return of the writ had resigned his benefice, &c. and that non habens bona neque catalla

estalla infra, &c. And it was held a good return of the refig-
nation, and that he may take thereof notice, if he will. Per
Choke, he ought to return *quod non habet nec habuit bona, &c.*
And yet per Cur. the return is good enough; and it was held
there, that *if the return be not good, the bailiff shall be amerced, and*
not the sheriff; quare inde. Br. Return de Briefs, pl. 94. cites
2 E. 4. 1.

15. In *assise against E. V. the writ was returned pleg. E. V. in-*
framinat. A. B. and C. D. where the return should be E. V. in-
framinat. attachiat. est per plegiagium A. B. and C. and not as
above; and three or four precedents were shewn that the first
return was well, but forty precedents were shewn to the contrary,
and by the other way; and therefore the best opinion was, that
the return is not good, because this word (*attach*) was wanting;
for there is no word in the return which proves the writ served
by any attachment made of the defendant; and also it was said
that two or three precedents were not a law, and especially where
there are 40 to the contrary. Br. Return de Briefs, pl. 93. cites
5 E. 4. 109.

S. C. cited
2 And. 100.
pl. 56. S. C.
in case of
Arden v.
Darcy.

16. In *scire facias* the sheriff returned *mandavi ballivo libertatis*
R. and did not shew whose liberty, &c. yet well; per Danby, contra
Pigot. Br. Return de Briefs, pl. 54. cites 9 E. 4. 19.

17. In *replevin pone issued*, and the plaintiff was nonsuited in the
county; and yet per Catesby, the sheriff may serve the pone; for it
is in full county as *recordare facias* is; *quod non negatur.* But
Brooke makes a *quære* of this opinion; for he says, it seems that
by the nonsuit there remains no plea to be removed, but he may
return, *quod ad proximum comitatum, &c.* the plaintiff was non-
suited, and so no plea there. Br. Return de Briefs, pl. 113. cites
12 E. 4. 11.

18. A double return is not good. As if the sheriff returns the
pluries against the abbot to admit the valet of the king to a corody,
that the king is not founder, and that King E. 4. had released to the
abbot all corodies; this is double; and if he returns, that the bishop
of F. is founder, and does not return the name of the bishop who
founded it, this is uncertain. Br. Return de Briefs, pl. 116. cites
3 H. 7. 6.

19. Where the sheriff serves the process once of a thing local or
permanent, as in *præcipe* of land, &c. he cannot return *mandavi*
ballivo after. Br. Return de Briefs, pl. 89. cites 5 H. 7. 27.

20. A man was outlawed, and reversed the outlawry, and had
writ of restitution of his goods directed to the bailiff of Westminster,
who returned that he was not bailiff; and no return; for he shall
answer if he has the goods or not; and if they were devested out
of his possession, he shall shew cause, &c. Br. Return de Briefs,
pl. 90. cites 6 H. 7. 9.

21. If judgment is given against an executor upon a demurrer,
and execution is awarded; the sheriff cannot return *nulla bona tes-*
tatoris, but is to return a *devastavit* as if it had been found against
the executor by verdict; for per Curiam he has charged himself

S. P. But if
R. brings
debt against
A. as exe-
cutor; and
upon plene

Adminis- by his own plea. Cro. E. 102. pl. 9. Trin. 30 Eliz. B. R. in
travit, and a nota at the end of the case of Stubbs v. Rightwile.
issue there-
upon *assets* are found, and judgment for the plaintiff; and upon a *testatum execution* is awarded to
the sheriff in another county than where the trial was, that the sheriff may return a *nihil*, and is not
eltopped by the verdict and judgment: but otherwise of the sheriff of the county where the action is
brought. Noy. 69. Robbins's case.—cites 9 H. 6. 9. Exec. 9.

[190] 22. Sheriff, upon a *latitat*, returned, that he arrested the body, and after, before the return of the *latitat*, a *habeas corpus* came to bring the body into Chancery, which being done the prisoner was discharged by order of the Court. This was held a good return; for the sheriff is bound to obey the king's writs, and to execute them, and he cannot compel the party to put in sureties to appear here. Le. 145. pl. 201. Trin. 31 Eliz. B. R. Carie v. Dennis.

23. Another exception was taken to the return, viz. a *custodia nostra exoneratus fuit*, which might be intended as to the cause in Chancery, only, and not for the cause here; for he hath not alleged, that he was committed to any other in custody; and for that cause day was given to the sheriff to amend his return. Le. 145. pl. 201. Carie v. Dennis.

24. The sheriff returned, that *rescous* was made by R. & W. upon such a bailiff, to whom he directed his warrant to execute the writ. It was moved, that the return was insufficient, because it doth not appear that the bailiff had *retorna brevium*, which ought always to be mentioned upon the sheriff's return. All the Court agreed, that it ought to have been so if he returned it as a return of a bailiff of a liberty, but here he returns in his own name, and though he named him in the return as a bailiff of the liberty, yet that is but a void addition. Cro. E. 780. pl. 16. Mich. 42 & 43 Eliz. B. R. Lady Russel and Wood's case.

25. A *capias* was returnable die jovis, which was the day of All Souls. The sheriff took the party, but returned, that because that day was not *dies juridicus*, he suffered him to go at large: and it was held an insufficient return; for per Doderidge the writ was good, and so was the taking and detaining the party by virtue thereof, though he could not have the party in court on the said day, and therefore was compelled to bring the party into court, which the same day he did accordingly. Poph. 205. Mich. 2 Car. Anon.

(M) Who shall be amerced.

Cro. E. 512. [1. IF the sheriff returns, *quod mandavit ballivo libertatis, &c.*
pl. 37. Palmer v. Potter, S. C. *qui sic respondit*, and returns an insufficient return in law,
but S. P. the sheriff shall be amerced; because he might have returned, *
does not appear. *quod ballivus nullum responsum dedit.* 8 H. 6. 9. Tr. 39 El.
Where the return is B. R. between Palmer and Marsh. Per Curiam. Contra 17
E. 3. 66. b.]

contrary to the verdict or confession of the party, it was held, that the sheriff shall be amerced in this case, and not the bailiff; for the return appears insufficient in law, of which the sheriff ought to take notice. Br. Return de Bricis, pl. 87. cites 3 H. 7. 12. — Pa. Return de Bricis, pl. 94. cites 2 E. 4.

¶ E. 4. 1. Contra, that it was held there, *that if the return be not good, the bailiff shall be amerced and not the sheriff.* *Quare inde.*

¶ S. P. For insufficient answer is as no answer. Br. Return de Briefs, pl. 89. cites 9 H. 7. 27. — *And in præcipe against two, if the bailiff returns the one summoned and the other not, this is no answer; and if the sheriff returns it, he shall be amerced. Ibid.* — *But per Vavisor, if the bailiff makes a dubious return, and the sheriff returns it over, he shall not be amerced: quare. Ibid.*

[2. *As if the sheriff returns, quod ballivus sic respondit, and returns * a pannel in which were only 9 names comprized, the sheriff shall be amerced, and not the baily; because the return is insufficient in law. 8 H. 6. 9. Dubitatur.*]

* Fol. 461.

N.B. In the original this

and the two following pleas are all marked with the same number of (2)

[(2.) *In a præcipe quod reddat if at the grand cape the sheriff returns, that he had sent to the baily of the franchise, &c. who had answered him, that he had taken the land into the hands of the king, and says nothing that he had summoned the tenant, as the writ commanded him, the sheriff in this case shall be amerced; because no return is made for part. 4 H. 6. 25. b. Per Babington.*]

See pl. 2. supra.

[(2.) *If upon the process, that is to say, fieri facias directed to the sheriff, the sheriff directs his warrant to the bailiffs of a franchise to execute it, who execute it; but before they make return of the warrant new bailiffs are elected and the old bailiffs removed, and after the old bailiffs return the warrant in their own names, the which they ought not to do, but the new bailiffs, and the sheriff makes his return to the Court accordingly, the sheriff shall be amerced; for he has accepted a return of those who are not bailiffs, but are as meer strangers, and he might have returned, quod nullum responsum dederunt. Tr. 39 El. B. R. between Palmer and Marsh. Per Curiam.*]

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See pl. 2. supra. — Cro. E. 512. pl. 37. Mich. 38 & 39 Eliz. PALMER v. POTTER, S. C. and clearly held by all the Court, that the writ being re-

turned by the bailiffs after Mich. when they were discharged of their office, was void, they having no authority to meddle with the return after; but if they had executed the writ before Mich. then the sheriff might have accepted of their return before Mich. but not after. — Mo. 431. pl. 606. Palmer v. Porter, S. C. accordingly.

[3. *If the sheriff returns feci returnum istius brevis G. & L. Ballivis libertatis G. qui habent returnum brevium & executionem eorundem qui mihi responderunt quod istud mandatum adeo tarde receperunt per manus attornati sequentis quod nihil inde facere potuerunt. The sheriff shall be amerced for this return; for when he says, that he returned the writ to the bailiffs, it is intended that it was in good time; for he ought to see that it be delivered to the bailiff in convenient time; and so the sheriff has accepted the answer of the bailiffs contrary to his own return; and therefore this is his default. 1 E. 3. 13. b. Adjudged.*]

[4. *In a præcipe quod reddat if the bailiff of the franchise serves the writ and takes pledges, the sheriff shall be amerced; for the sheriff ought to have taken the pledges. 14 H. 6. 3. b.*]

[5. *If the sheriff returns quod mandavit ballivo, &c. who answered, &c. if the return be sufficient, and a default is for not doing according to the return, the baily shall be amerced, and not the sheriff.*]

Where the bailiff makes a false return to the sheriff, and he

[6. *As*

returns it
over, as
quod cepit
corpus, and
he has him
not at the

day, yet the bailiff shall not be amerced. Per Cur. for he is not immediate officer to the Court. Br. Return de Briefs, pl. 89. cites 9 H. 7. 27.

[6. As if the sheriff returns quod mandavit ballivo libertatis, &c. qui respondit quod cepit J. S. according to the writ, and shall be here at the day, if he does not bring him at the day the bailiff shall be amerced and not the sheriff. Contra 47 Ass. 6.]

7. Where the under-sheriff returns a pannel by precept directed by him to one who is not bailiff of the franchise, by which the pannel is quashed, the sheriff himself shall be amerced, and not the under-sheriff; and action upon the case lies against the sheriff himself, quod nota; for it is returned always in the name of the sheriff himself. Br. Return de Briefs, pl. 77. cites 38 Ass. 13.

The Re-
porter says,
quære if it
be law.

8. Two chaplains were indicted of felony, and pleaded not guilty, and the sheriff returned a jury, and by examination of the justices it appeared that they had not sufficient franktenement according to the statute, by which the sheriff was amerced to 100 shillings, and the sheriff said that the bailiff of the franchise of Bury returned it. Per Grene J. the king has no minister but the sheriff, and where the king is party, no franchise shall be allowed, but the sheriff shall serve the writ. Br. Return de Briefs, pl. 78. cites 38 Ass. 19.

9. In forcible entry, per Prisot Ch. J. where process issues, and the sheriff or bailiff is plaintiff, yet he may serve the process as sheriff, or return, quod mandavi ballivo, &c. who is plaintiff, and if the bailiff return quod cepit corpus of the defendant, and has him not at the day, &c. the bailiff shall be amerced, and not the sheriff, and the sheriff is not bound to take consuance if the bailiff be plaintiff or not; for there may be another of the same name. Br. Return de Briefs, pl. 65. cites 36 H. 6. 1.

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10. 27 H. 8. cap. 24. Enacts, that amerciements for insufficient returns made by stewards or bailiffs of liberties shall be set upon their heads and not upon the sheriffs.

Vent. 24.
Anon. S. P.
and upon an
affidavit the
sheriff was
amerced.

11. The sheriff returned non est inventus to a writ brought against his own bailiff, and delivered to him; but the Court amerced him 40l. and ordered him to amend his return. Vent, 12. Pasch. 21 Car. 2. B. R. Anon.

See (L) pl.
6. 7. (L. 2)
(P) pl. 1.
(R)

(M. 2) Sheriff amerced in what Cases, and upon what Return.

But where
a bailiff
makes insuf-
ficient re-
turn to the
sheriff, and
he returns it
over, he shall
be amerced.
Br. Return
de Briefs,
pl. 89. cites
9 H. 7. 27.

1. **I**N dower the tenant made default after default, by which the demandant said that her baron died seised, and prayed writ to enquire of the damages, and had it, and the sheriff returned, that the inquest gave no damages. Caund. prayed that the sheriff be amerced, because the writ is not served; but per Thorp the sheriffs shall not be amerced, but where he returns the writ illy of himself, and here he has returned it as the jury presented, by which he shall not be amerced. Br. Return de Briefs, pl. 20. cites 44 E. 3. 3.

2. In

2. In *attaint* the writ is *diligenter inquiras qui fuerunt juratores primæ inquisitionis*; therefore there if the sheriff returns 11 of the first jury, and one who was not any of them he shall not be amerced; for he may mistake some in inquiring of them; but there at the surmise of the party process shall issue against the twelfth, quod nota bene. Br. Return de Briefs, pl. 115. cites 48 E. 3. 15.

3. The plaintiff pray'd that the sheriff should be amerced because he had returned *pledges for the abbot and the commaign nihil*, where those pledges shall serve both; as of baron and feme, but distress was awarded against the abbot & idem dies to the commoigne. Br. Return de Briefs, pl. 25. cites 48 E. 3. 26.

Br. Abbe,
pl. 4. cites
S. C.

4. At the distress with proclamation in writ of ward the sheriff ought to enter the franchise to serve the writ, because it is limited to him by the statute to do it, as in writ of enquiry of waste quod accedat ad locum vastatum, and not to make mandate to the bailiff of the franchise to serve the distress, and to serve the proclamation himself, scil, by parcels; per Thirn. and Mark; but Rickhil and Tirwit contra; and at last alias distringas with proclamation was directed to the sheriff. Br. Return de Briefs, pl. 26. cites 2 H. 4. 1.

Br. Ejectione Custodie, pl. 1. cites S. C.

5. The sheriff was amerced where he returned at the pluries in *replevin quod averia sunt in parco sub secura clausura*, because he had not taken *posse comitatus*, and made deliverance, as if they had been in a castle or fortress. Br. Return de Briefs, pl. 33. cites 8 H. 4. 19.

Br. Replevin, pl. 17. cites S. C.

6. In *scire facias against baron and feme*, if the sheriff returns that they are divorced he shall be amerced; for persons divorced may be warned. Br. Return de Briefs, pl. 4. cites 2 H. 6. 5.

Br. Charters de Pardon, pl. 2. cites S. C.

7. *Fieri facias against executors* upon recovery against them, the sheriff returned, that the defendants *nihil habent*, &c. *post adventum brevis prout sibi aliquo modo constare poterit*. And the opinion of the Court was that he shall be amerced; for he cannot return, that the defendant non est inventus prout ei constare poterit, but he shall return directly that nihil habet, or that non est inventus, &c. But he may return *quod executores elongaverunt bona*, or *quod bona elongata sunt*, &c. and thereupon the plaintiff had execution de bonis propriis, &c. Br. Return de Briefs, pl. 8. cites 9 H. 6. 56.

Br. Bill, pl. 21. cites S. C.

8. In *covenant to levy a fine*, the sheriff returned nihil, and it was said that it was ill, because he might *summon him in the land in the writ*, whereof the fine shall be levied; quod *quære*, because it may be that he is thereof tenant, and sicut alias shall issue without amercement of the sheriff. Br. Return de Briefs, pl. 122. cites 10 H. 6. 12.

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9. In *trespass*, per Fortescue, the sheriff returned 6d. issues upon the distress, and therefore he was amerced, because he returned less than the costs of the writ of distress, which is 13d but quære; for per Paston, he shall have averment against the sheriff of petit issues returned, and not as above. Br. Issues returned, pl. 6. cites 19 H. 6. 8.

10. Where

10. Where the *sheriff* returns *quarto exactus upon exigent*, and the coroners upon *certiorari* to them directed, *certify that the defendant is outlawed*, the certificate shall be intended true, and the return of the *sheriff* false, by which the *sheriff* was amerced to 40*l.* as appears there. Br. Retorn de Briefs, pl. 59. cites 37 H. 6. 21.

11. The *sheriff* embezeled an *exigent*, which was delivered of record, and wrote two others, and returned them without seal, and was amerced in 20*l.* for embezeling, and 40*l.* for every copy returned, [scil. the] sum of 100*l.* by all the justices. Br. Retorn de Briefs, pl. 95. cites 5 E. 4. 4.

12. Where *process* is made by the *sheriff* to the bailiff of the franchise, and the *sheriff* returns *quod ballivus non dedit responsum*, and *capias issues*, and after *alias* with *non omittas*, and the *sheriff* writes to the bishop again, he shall be amerced; because he had not entered the franchise; per Littleton; *quod Curia concessit*. Br. Retorn de Brief, pl. 100. cites 20 E. 4. 11.

See (R)

(M. 3) Sheriff amerced. Upon what Return.
Mandavi Ballivo, &c.

1. **D**ISTRINGAS of debt, the *sheriff* returned *mandavi ballivo libertatis de D. qui nullum mihi dedit responsum* and because he did not return *quod nullos habet exitus in balliva mea*; therefore he was amerced one mark, and *non omittas* awarded. Br. Retorn de Briefs, pl. 23. cites 47 E. 3. 3.

2. The *sheriff* of S. returned, that he had commanded such a one, his bailiff errant, who had *returnum omnium brevium et executionem eorundem per chartam regis, qui nullum dedit responsum* and because the bailiff was not returned bailiff of any franchise or seignory, the Court would have amerced the *sheriff*, *tanquam exheredatorem coron. domini regis*, by the statute, and after the *sheriff* was amerced to one mark; and the truth was, that the king had granted to J. N. ball. *itinerantem in the county of S. & executionem omnium brevium, &c.* Br. Retorn de Briefs, pl. 27. cites 2 H. 4. 4.

Br. Office et
Off. pl. 9.
cites S. C.

3. In *wast*, the *sheriff* returned *mandavi ballivo, &c. Qui nullum dedit responsum*, and therefore was amerced; for in this writ he ought to have entered the franchise; for he is judge and officer by the statute, which wills *quod accedat ad locum vastatum, &c. et ibi facere inquisitionem, &c.* Br. Retorn de Briefs, pl. 138. cites 11 H. 4. 82.

4. In *assise*, the *sheriff* returned *quod mandavit ballivo de E. qui mihi respon. &c. and returned nine jurors*, and the *sheriff* was amerced; for he ought to have returned *quod mandavi, &c. Qui nullum mihi dedit respon.* Quod nota; and they advised what to do to the bailiff, because it is the return of the *sheriff*, and not of the bailiff. Br. Retorn de Briefs, pl. 47. cites 6 H. 6. 9.

5. In *assise*, the *sheriff* returned *quod mandavi J. B. ballivo libertatis de E. cui exec. istius brevis pertinet fac. eo quod executio ejusdem*

eiusdem in balliva mea extra libertatem predictam fieri non potuit, and they were adjourned to know if the sheriff should be amerced or not, inasmuch as he *has not returned that the bailiff had returnum omnium brevium et exec. eorundem*. Br. Retorn de Briefs, pl. 6. cites 9 H. 6. 35.

6. In B. R. the sheriff returned *mandavi ballivo libertatis de D.* and it was said, that there is no such franchise, and if it be inrolled in the Chancery that *A. has returna brevium*, yet if it be not inrolled in the Exchequer, as is the statute of Westm. 2. cap. 32. and if the sheriff returns another liberty, he shall be punished *tanquam exheredat, coron.* by this statute, and the justice may send *certiorari* out of the Chancery to the treasurer, that he bring the roll in his hand of the liberties, and shew it to the justices. Br. Retorn de Briefs, pl. 98. cites 11 E. 4. 4.

Br. Certiorari, pl. 13. cites S. C.

(N) Return of the Sheriff by Bailly.

[1.] IF the sheriff returns that the bailly of the franchise, who has return of writs has returned, &c. This is good, though he does not shew of what place he is bailly; for if it be made by one of the baylies, it is sufficient. 29 E. 3. 1. b.]

[2. If a writ of inquiry of damages be directed to the sheriff, he ought to make return, that he had sent to such a bailly of such a liberty, &c. and returned his answer, & *quod alibi infra comitatum predictum per se fieri non potuit*; this is not a good return; for the writ [is] directed to the sheriff himself to be executed in any part of the county, and no venue contained in the inquest of office, and there is not any other writ which intitles the baylies of liberties. Hobart's Reports, 114. between Wirely and Gunstone, per Curiam. But they would not reverse the judgment; because there were diverse precedents accordingly.]

3. Where a man is bailiff in fee in a county, the sheriff shall not write to him but as bailiff of guildable, and not as he does to bailiff of franchise, and by his act [default] *non omittas* shall not issue, nor shall the sheriff make mention of him in his return, as he shall do of bailiff of franchise; but shall return it as if he himself had served the writ, and yet challenge shall lie by default in the bailiff to the array. Br. Retorn de Briefs, pl. 69. cites 27 Ass. 65.

Br. Process, pl. 98. cites S. C. But Brooke adds, nota, that he is officer of fee in this precinct; for if such a

bailiff does not execute the precept, *non omittas* shall not issue, and therefore it is a good challenge, that the array was made by B. bailiff, &c. though the return be in the name of the sheriff himself; *quod nota*. And Brook makes a quære if the sheriff may return *mandavi ballivo* upon such a bailiff of fee.

If there be a perpetual bailiff by charter within the guildable, he is still bailiff to the sheriff, and not to any lord of a franchise; and therefore the sheriff, not being to enter a franchise, he cannot return *mandavi ballivo*, and if he could, there could not be a *non omittas* upon it, because there is no liberty to be entered; and therefore if such bailiff, within the guildable, does not execute such writ, and give the sheriff a satisfactory answer, he may execute the writ by his own bailiff; for he is intirely responsible to the Court for the execution of the process; where the return relates to things permanent, the sheriff must return *mandavi ballivo* to the first process; for if he makes any other return to such process, such return concludes of course that the execution of the writ was in his power, and that the permanent thing in execution to be done, was within the guildable, and he cannot contradict such return, by any subsequent return to another writ. G. Hist. of C. B. 25, 26.

Thus in alias summons in dower, the sheriff cannot return *mandavi ballivo*; for he ought to have made

made this return upon the first writ, that so the Court might have awarded a non omittas; but if it relates to matters transitory, then the sheriff may return mandavi ballivo on the second process, as on an alias capias; for the body might be in the liberty at the issuing the second process, though it was in the guildable at the first; and therefore the return of the first process does not conclude him from returning the liberty to the second process. G. Hist. of C. B. 26.

* 4. Against the king party no franchise shall be allowed, but the sheriff himself shall serve the writ. Br. Return de Briefs, pl. 78. cites 38 Aff. 19.

5. In attachment upon contempt, the writ was returned by the deputy of the coroner, and not by the coroner himself; and it was awarded good. Br. Return de Briefs, pl. 40. cites 12 H. 4.

6. The sheriff made a warrant ballivus suis to arrest a person, and the bailiffs of a franchise returned a rescous; exception was taken, because the return was made by those who were not his bailiffs; but adjudged that the return was good, because the franchise might be within his bailiwick, and that all the precedents are so. March. 25. pl. 57. Pasch. 15 Car. Anon.

7. In case against a bailiff for the false return of nulla bona upon a fieri facias, the question was upon the evidence at the trial, whether the bailiff of a liberty shall be concluded in point of evidence by the return of the sheriff? And per Cur. he is concluded; and if the sheriff make any other return than that which the bailiff makes to him, he may have his action against the sheriff. And it was said that Holt Ch. J. was of this opinion. Ld. Raym. Rep. 184. Easter 9 Will. 3. Shaw v. Simpson, cites 36 H. 6. 40.

(N. 2) Return. How. Partly by Sheriff, and partly by Bailiff of Franchise.

1. **A**SSISE of common pasture in F. appendant to his frank-tenement in C. where F. was franchise, and C. guildable, and the assise was taken of foreigners, and of none of the franchise: quod nota. Br. Return de Briefs, pl. 67. cites 11 Aff. 5.

In assise, the habeas corpora jurat. with octo tales issued to the sheriff, who

returned quod mandavi ballivo libertatis, &c. who returned the habeas corpora served, and as to the tales, that there were no more sufficient in the liberty, by which the sheriff served the octo tales, and all of the habeas corpora were challenged and struck out by two of the octo tales; and because the sheriff returned the octo tales, and not the habeas corpora, where he ought to have returned all, as here; therefore it was held not sufficient, and a new summons with non omittas was awarded. Per Cur. quod nota. Br. Return de Briefs, pl. 32. cites 8 H. 4. 16.

3. *Præcipe quod reddat*; the sheriff was amerced, because he returned quod mandavit ballivo libertatis de D. who took pledges, and made the summons; for the sheriff himself ought to have taken the pledges de prosequendo, though he cannot serve the summons; for first he shall take pledges, and then he shall make his mandavit to the bailiff, &c. by which sicut alias was awarded. And so see writ

writ served by parcels. Br. Return de Briefs, pl. 61. cites 14 H. 6. 3.

4. It seems, that where the *issue* is of land, part guildable, and part franchise, the pannel shall be returned part by the sheriff, and part by the bailiff of the franchise, and they may join, and the distress [may be] by the sheriff only, if the bailiff be remiss. Br. Return de Briefs, pl. 50. cites 19 H. 6. 48 & 57.

Br. Ejectione Custodie, pl. 1. S. P. cites 2 H. 4. 1. Per Rickhill and Tirwhit.

(O) Return of Sheriff. * *Averment against it.*

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[1.] IF a writ be brought against J. B. and the sheriff distrains T. B. by the name of J. B. he cannot aver against the return to save his issues, that his name is T. B. where he was distrained by the name of J. B. 19 H. 6. 80. b. Curia.]

Fol. 462.

See (P) pl. 1. —* At common law when the

sheriff made a false return upon a writ, an action might be brought against him for this falsity, and in this action the sheriff's return might be traversed. Jenk. 143. pl. 98. — And the reason why an averment did not lie against the sheriff's return at common law is, that he is a sworn officer to whom the law gives credit. Jenk. 143. pl. 98.

[2. [But] in *præcipe quod reddat*, at the summons returned, defendant may say that his name is T. B. and that he was summoned by the name of J. B. because otherwise he shall lose the land by default. 19 H. 6. 80. b.]

[3. If the sheriff returns a man outlawed of felony, he may aver against this return, that he came at the 5th county, and tendered surety, and so was not outlawed; for this is the case of life and member. 1 E. 3. 24. b.]

Jenk. 122. pl. 47. cites D. 223. Hutton's calc. — This case was ac-

quiesced to be law. Per Cur. 12 Mod. 424. Mich. 12 W. 3. in case of More v. Watts. — Upon an indictment of felony against A. if the sheriff returns A. outlawed, A. may aver against this return, that he surrendered himself at the exigent. Jenk. 94. pl. 82. — 122. pl. 47.

But he who is outlawed shall not have averment that he was proclaimed 3 or 4 times only, but shall have his action against the sheriff. Br. Action sur le Case, pl. 122. cites 10 H. 7. 23. Per Keble. — Br. Averment contra, &c. pl. 65. cites S. C.

4. Jenk. 121. pl. 45. says, that the statute of *articuli super chartas*, cap. 15. gives averment in *assise* not attached by 15 days.

It was said by diverse justices,

that before the statute of *articuli super chartas*, a man should not say in *præcipe quod reddat*, *non summonitus fuit secundum legem terræ*. But Brook says quære inde; for it seems that there is not any such matter in the statute of *articuli super chartas*. Br. Averment contra, &c. pl. 17. cites 5 E. 4. 80.

5. 1 E. 3. cap. 4. gives averment against false return of judgment out of the county or court baron.

See False Judgment (C)

6. In false judgment the sheriff returned, that the jurors said that they had no such record there, and the party averred the contrary, and had sicut alias; quod nota. Br. Averment, pl. 35. cites 13 E. 3. and Fitzh. Responder 80.

Br. Averment contra &c. pl. 35. cites 13 E. 3. Fitzh. Responder, 80.

7. Jenk. 121. pl. 45. says, That where the tenant vouches, and the sheriff returns the voucher summoned where he is dead, or that there is where the

Voucher (P. 2) 4. — S. P. And is where the

sheriff in *is no such person*, the statute 14 E. 3. 18. gives an averment against
præcipe such return.
quod reddat

returns the tenant dead, by the equity of the said statute the demandant may *aver* his life. Jenk. 122. pl. 47.——S. P. Jenk. 143. pl. 98.——S. P. And upon such averment the demandant shall have an alias summoncas. Jenk. 94. pl. 8.

In *præcipe quod reddat* it is admitted, that when the *sheriff returns that the vouchee is dead*, the tenant may say that he is alive, contrary to the return of the sheriff; but per Finch, if the sheriff returns him dead again at the *sicut alias*, the sheriff shall not have *sicut alias* again by *testatum est*. Br. Averment contra, &c. pl. 5. cites 40 E. 3. 36.——If the sheriff returns the vouchee dead, the demandant or tenant may aver the life of the tenant [vouchee] the one for his action to proceed, and the other to have the warranty; per Danby Ch. J. but Choke contra, and that to have alias is not inconvenient. Br. Averment contra, &c. pl. 18. cites 3 E. 4. 20.——S. P. Br. Averment contra, &c. pl. 31. cites 20 E. 4. 11.

If the sheriff returns upon cape *that the defendant is dead*, the plaintiff may *aver*, contrary to the return of the sheriff, *that he is alive*. But it was said the same fol. in ven. fac. that the statute does not aid to have averment of life, but where the sheriff returns the vouchee dead; therefore quære of the averment. Br. Averment, pl. 34. cites 20 E. 4. 11.

[197] 8. The sheriff returned that he had made execution in value to the vouchee, and the vouchee averred the contrary, and prayed *sicut alias*, and had it. Br. Averment contra, &c. pl. 37. cites 20 E. 3. Fitzh. Recovery in Value 4.

If the sheriff returns *petit issues*, the party may have averment against him
 9. Process issued against the bishop to disincumber the church, and the sheriff returned issues, and the party took averment, that he might have returned greater issues, and had the averment, and writ to the justices of assise to inquire thereof. Br. Averment, pl. 53. cites 21 E. 3. 30.

thereof, and recover his damages. Br. Averment, pl. 12. cites 8 H. 6. 12. Per June J.——S. P. Per Paston. Br. Amercement, pl. 27. cites 19 H. 6. 8.

The sheriff returned 20d. in issues, and the plaintiff averred, that between the *teste* and the return the sheriff might have returned 100s. in issues, by which it was sent to the justices of assise to take the averment. Br. Averment, pl. 2. cites 20 H. 6. 25.

Br. Averment, contra, &c. pl. 42. cites 25 E. 3. 39. S. C. Brooke says, and so
 10. In *præcipe quod reddat* the sheriff returned the first day, that the defendant is not tenant, and that nihil habet, and this notwithstanding, upon *testatum* of the demandant that he was tenant, summons in terra petita was awarded. Br. Sommons in Terra, pl. 23. cites 25 E. 3. and Fitzh. Return de Viscont 97.
see testatum of the demandant contrary to the return of the sheriff accepted.

11. *Trespass* against the abbot and his commoign, the sheriff returned issues upon them, and the abbot came and said that the other is not his commoign, and prayed to be discharged of the issues, and a good plea, and the other compelled to answer thereto, &c. Br. Averment contra, &c. pl. 38. cites 33 E. 3. and Fitzh. Issues 3.

12. One *sued* certificate out of a statute merchant, and *capias* to take his body and to extend the land, and the sheriff returned that he had extended the land and delivered it to the plaintiff, and that the body is not found; and the conusee came, and said that the lands are extended too high, and prayed that they be delivered to the extendors according to the statute of Acton Burnel, and could not have it; per Cur. because the sheriff had returned that the conusee had taken them, and also he came in another term. Br. Statute Merchant, pl. 2. cites 44 E. 3. 2.

13. Tirwight

13. Tirwight came to the bar, and shewed how upon capias the sheriff of York had sent his precept to the bailiff of the liberty of the Bishop of E. who sent to the sheriff the body of the defendant, which sheriff had returned non inventus, by which he tendered averment contrary to the return, &c. and it was not suffered; for no averment was contrary to the return of the sheriff at common law, per Thirn. and the statute gives no averment but upon petit issues returned, quod nota. Br. Averment contra, &c. pl. 7. cites 2 H. 4. 15.

14. *Homine replegiando*; the sheriff returned that he sent to the bailiff of the franchise of D. where the plaintiff was imprisoned, who returned no answer: the plaintiff came and said, that the bailiff by his warrant had delivered him, and so he was now at large, and prayed process against him, who took him. And per Cur. we do not know if he be the same person without the return of the sheriff, and so denied his prayer, and non omittas issued to the sheriff. Br. Averment contra, &c. pl. 39. cites 11 H. 4. 7.

S. P. But when the sheriff has returned that he is at large, he shall have attachment against the defendant.

Br. Process, cites 11 H. 4. 7. pl. 174.

15. In detinue it was said by Thirn. That where deed is delivered to A. upon condition if B. upon reasonable warning levies a fine of certain lands, &c. to C. That it shall be delivered to the obligor, and the garnishee in detinue of his writing said, that he did not levy the fine according to the form of the condition, and B. said that he was not warned, and C. said that he sued writ of covenant to levy the fine, and the sheriff returned him summoned, which is sufficient warning. And per Thirn. because now they are in another action, the party may say that he was not warned though his averment be contrary to the return of the sheriff, but in the same action he shall not say so; and also it was said, that the party himself ought to warn him; for the summons is not the garnishment of the party, quod nota. Br. Averment contra, &c. pl. 9. cites 11 H. 4. 18.

Br. Condition, pl. 39. cites S. C.

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16. Debt upon a lease for years rendring rent payable annually at D. the defendant said, that he has been always ready to pay, and yet is, and tendered the money to the Court; the plaintiff pleaded estoppel that the sheriff returned the defendant summoned, and after returned him attached, and after returned distring. nihil by which capias issued till the pluries, when he came in ward of the sheriff, and had day given over, at which day he made default, and distress issued, and returned that he had nothing, and capias issued again returnable, &c. at which day he came and pleaded, judgment if against this record he shall say, tout temps prist. And per Hill and Hank. the return of the sheriff is no estoppel; but Thirn. contra & adjournatur. And much default was said to be in the defendant, because he appeared, and had day over, and made default, and after came again, so that it cannot be that he has been always ready, &c. And per Norton he ought to plead this tender at D. according to the reservation, quære inde. And so per Hill and Hank. clearly he shall not be estopped; for it may be that he was never summoned, attached, or distrained notwithstanding the return; but Thirn. contra, and that if he be so, the defendant shall have action

Br. Averment contra, &c. pl. 40. cites S. C. Brooke says, the reason that he shall say this contrary to the return of the sheriff seems to be inasmuch as this matter goes in condemnation of the defendant in damages if he was not ready.

of deceit against the sheriff. Br. Tout temps, &c. pl. 12. cites 11 H. 4. 61.

17. *Scire facias* upon recognizance against J. abbot of D. the sheriff returned J. abbot warned, and R. abbot of D. came and said, that he is abbot, and J. was deposed before the writ purchased, et non allocatur; for J. is warned by the return of the sheriff, and if R. be abbot he shall not be bound by the judgment. Br. Averment contra, &c. pl. 24. cites 2 H. 6. 5.

Br. Averment contra &c. pl. 2. cites S. C. but says

18. If the sheriff returns that the *summoners and veiors are dead*, the plaintiff shall not have averment, *quære hoc*. Br. Disceit, pl. 5. cites 33 H. 6. 9.

quære if he may not say that the *summoners and veiors* were J. S. and J. N. and of D. that those who appear are J. S. and J. N. of S. For this stands with and is not merely contrary. *Quære*, for non adjudicatur. — If the sheriff returns *summoners and veiors*, who appear, the plaintiff shall not say, that those who appear are not the *summoners and veiors* but others of the same name contrary to the return of the sheriff; by the opinion of all the Court in Cam. Scac. Br. Averment contra, &c. pl. 29. cites 6 E. 4. 6.

19. *Præcipe quod reddat* the sheriff returned *mandavi ballivo libertatis episcopi Eborum qui habet plenum return.* omnium brevium, &c. *qui mihi respondit quod suum.* Laken said, the land is in the franchise of D. and not in this franchise, &c. And per. Prisot you shall not have the plea; for none can take issue with you neither the demandant nor the sheriff, and it is not reason that the sheriff shall be amerced by issue taken between the demandant and the tenant, to which he is a stranger, and if there shall be issue, and it is found for the tenant, a new summons shall issue, and the sheriff shall return sicut prius; for it may be that the issue was falsely found, therefore answer over; quod nota. Br. Averment contra, &c. pl. 3. cites 34 H. 6. 3.

Br. Averment contra, &c. pl. 23. cites S. C. S. P. And per Fortescue Ch. J. the sheriff may say that

20. In debt if the sheriff returns that the defendant is *quarto exactus* upon exigent, the plaintiff may aver that the defendant is *duly outlawed*. and may have certiorari to the coroners to certify it. And it seems that it stands with the return of the sheriff; for he who is *quinto exactus* and outlawed is *quarto exactus* and more. Br. Averment, pl. 21. cites 36 H. 6. 24.

the coroners who made the certificate were discharged from their offices before, &c. Brooke makes a quære if this shall be intended before the judgment of outlawry, or before the making of the certificate. And says, it seems that the one or other is sufficient. And per Fortescue this proves that the sheriff is not attaint by the certificate of the coroners; for he who is attaint shall not have answer after. Br. Averment contra, &c. pl. 25. cites 36 H. 6. 26.

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21. *Witnesses were returned dead*, and the defendant said that they were alive, and prayed that the sheriff be examined, and so he was, and said, that he nor his under-sheriff did not return it but such a clerk, by which he was suffered to amend it, and returned them summoned. Br. Examination, pl. 34. cites 37 H. 6. 11.

If the sheriff upon a capias returns a cepi corpus, et

22. In action personal if the sheriff returns *cepi corpus and mortuus est in prisona*, there the plaintiff may aver his life. Per Littleton and per Danby this is true; for otherwise the writ shall abate, and the plaintiff

plaintiff shall lose his suit. Br. Averment contra, &c. pl. 18. cites *quod est languidus in priso*, 3 E. 4. 20. there I may come and falsify the return of the sheriff to save my imprisonment. Bac. Elem. 29.—Jenk. 143. pl. 98. accordingly.

23. In *trespass* the sheriff returned the defendant attached by certain goods, and at the day the defendant was *essoigned* which was adjudged and adjourned, and after this the defendant had writ to the sheriff to redeliver the attachment, and the sheriff returned that he had made deliverance; and the defendant prays *alias*, alleging that he had not made deliverance. And per Danby Ch. J. you shall not have this; for it is contrary to the return of the sheriff, but you may have bill upon the case against the sheriff upon his account. Br. Averment contra, &c. pl. 18. cites 3 E. 4. 20. Br. Bille, pl. 28. cites S. C.

24. In *dower*, if the demandant recovers, and the sheriff returns execution of the third part, the demandant shall not say that he has not served the writ; for it is contrary to the return of the sheriff; per Pygot. Br. Averment contra, &c. pl. 18. cites 3 E. 4. 20.

25. A man shall not have averment against the return of the sheriff in the same action in which the return is made, but in another action. Br. Averment, pl. 80. S. P. But he may have averment which stands with,

&c.—As in *assise*, he may say * *not attached by 15 days*, but shall not say *not attached only*. So in *præcipe quod reddat*, he may say, that he was *not summoned secundum legem terræ*, but shall not say, *not summoned only*; for this is merely contrary, and the other stands with, &c. And where the sheriff returns execution made, the other shall not say, that he did not make execution in this action; but in action upon the case for this return, he may have the averment; note the difference. Br. Averment contra, &c. pl. 19. cites 5 E. 4. 1.—S. P. Dalt. Sher. 191. cap. 42. cites 5 E. 4. 2.—S. P. Nor where the sheriff returns *rescous*, *non est inventus*, &c. A man shall not say, that the party was found within the bailiwick of the sheriff, or that he was not rescued. Br. Averment contra, &c. pl. 26. cites 7 H. 7. 4. [but no mention is made of its being in the same action.]

* For there he confesses that he was attached or summoned, but not in due form, &c. Br. Averment contra, &c. pl. 18. cites 3 E. 4. 20.—S. P. Jenk. 143. pl. 98.

26. Debt against the bailiffs of a franchise, inasmuch as J. S. was condemned to the plaintiff, and he had *capias ad satisfac.* to the sheriff, who returned that he had sent precept to the bailiffs of the said franchise to take him, by which they took him, and after suffered him to escape, of which the plaintiff has brought this action. Laken said, there was no such warrant directed to the bailiffs, *prist.* And per Littleton, you shall not have this answer; for it is contrary to the return of the sheriff; but Choke and Danby said yes, in another action, but not in this same action in which the return is: *quod nota.* Br. Averment contra, &c. pl. 19. cites 5 E. 4. 1. Dalt. Sher. 191. cap. 42. cites S. C.

27. Where two appear by return of the sheriff as summoners in *præcipe quod reddat*, in which the plaintiff lost by default, the defendant, who recovered, shall not say that those who appeared are J. N. the younger, and that he who made the summons was J. N. the elder, nor such like; for it is contrary to the return of the sheriff, and does [not] stand with it, and the averment was ousted. Br. Averment contra, &c. pl. 17. cites 5 E. 4. 80. [200] S. P. Br. Disceit, pl. 25. cites 5 E. 4. 40. 54.—S. P. Br. Confess and Avoid, pl. 41. cites 5 E. 4. 40.—So it was

agreed that where * *suitors in writ of false judgment appear by return of the sheriff*, or the first jurors in *attaint*,† or *rediffisin*, or the witness of a deed, or infant comes by return of the *venie facias* to be viewed, or *voucher* comes in *præcipe quod reddat* by return of the sheriff, there the other shall

shall not aver, that this is another person of the same name, and not him who was suitor, juror, &c. Nor where a juror impannelled comes to be sworn, the party shall not say, that he who appeared was another of the same name; for then, when another comes, he may say similiter; and so in infinitum which shall be inconvenient. Br. Averment contra, &c. pl. 17. cites 5 E. 4. 80. — Br. Disceit, pl. 25. cites 5 E. 4. 40. and 54. S. P.

* S. P. By the opinion of all the Court in Cam. Scacc. Contra Moyle, and shewed thereof precedents, and it seems, that it stands with, &c. Br. Averment contra, &c. pl. 29. cites 5 E. 4. 6.

But Jenk. 122. pl. 46. cites 5 E. 4. 93. is, that where A. recovers against B. in a *præcipe quod reddat* by default; and a writ of *disceit* is brought, and the sheriff for summoners returns C. and D. de Dale, yeomen, summonitores, the tenant shall have an averment against this return, that there are in Dale, yeomen, two C's and D's, and that C. and D. named in the sheriff's return to be summoners, are the elder, and other C. and D. the younger, by which the sheriff has returned the said false summons to be made.

But if they appear upon distress, or other process awarded upon the return. 28. And by some, if the sheriff returns, upon *capias*, *cepi corpus*, and afterwards A. and B. make *rescous*, the *rescous* shall not be traversed upon the same return. Br. Averment contra, &c. pl. 17. cites 5 E. 4. 80.

cons, there he may traverse the *rescous*; note the difference; for there he comes for the same purpose to answer to it. Ibid.

D. 212. pl. 36. Pasch. 4 Eliz. Anon. says, it seems that a return of *rescous* may be traversed, and cites Lib. Intrat. 58. but that there it appears, that the rescuers rendered themselves in Court, and were committed to the Fleet at the request of one that sued for the king, and there in ward they traversed the *rescous*, viz. not guilty, per patriam, and the other e contra; and thereupon he was bailed. — The sheriff, upon a *capias*, returned *cepi corpus* & illud deliberavit to the constable of the castle of S. in the same county, and that an abbot came vi & armis, and rescued him out of his ward, &c. Upon this return, a *capias* was awarded against the abbot, who came by mainprise upon superfeetas out of Chancery, and pleaded not guilty, and was received to traverse, notwithstanding the return of the sheriff, and made attorney. inasmuch as he came gratis out of ward D. 212. pl. 36. cites Mich. 13 R. 2. but adds a note, that the sheriff had charged himself by this return, per Curiam, inasmuch as he once had the body, &c. — And it is said, D. 212. b. That the word (*convicted*) in the statute W. 2. cap. 40. [39] proves that they may have a traverse, &c. according to the 13 E. 4. Rot. 3. inter placita regis per Dominum Catlyn, where the defendant, acquitted by nisi prius, went sine die, and quære Hill. * 5 H. 8. in uno vel altero Banco a travers to a *rescous* returned, received and allowed.

* This case is in Kelw. 165. b. pl. 1. Hill. 5 H. 8. That the sheriff of D. returned a *rescous* upon a *capias* in trespass against the defendant, and others that were strangers to the suit, whereupon it was prayed, that the *rescuers* might put in pledges for their fines by attorney; and the opinion of the whole Court was, that they should not be received, but must first render themselves to prison, and then put in pledges; and the next day they tendered travers by attorney, and were received, and it was said, that they should not be received to tender travers by attorney, in case a *cepi corpus* had been returned against them; quod nota, &c.

The case in Dyer supra, and the case of 13 E. 4. Rot. 3. were cited in the case of Lady Russell and Wood. Cro. E. 781. pl. 16. Mich. 42 & 43 Eliz. B. R. and said, that in C. B. it is usual to admit a traverse in such cases. But the clerks said, that the course of this Court has always been to reject such traverses, and that the precedent of 13 Ed. 4. which is cited, could not be found; wherefore Popham, and the Court commanded, that precedents should be searched, whether a traverse had been admitted in such case; and if it could not be found before these times to have been admitted, then it should not be allowed. Wherefore, &c.

In a writ of privilege against the defendant the sheriff returned a *rescous*; and it appearing upon affidavit, that there was probable cause to induce the Court to believe the return to be false, the Court was moved to discharge the attachment, but refused, the sheriff being an officer of great trust in execution of the process of the Court. And though they could shew precedents of traverses entered, and tried and allowed; yet all the Court was of opinion, contra; but afterwards they respited the attachment for 14 days, that the parties might appear in the mean time, they living in Yorkshire; and that then they might traverse at their peril, or do otherwise, as they should be advised. But all the judges were of opinion, that their submitting to a fine would not conclude them from bringing actions against the sheriff if his return was false. 2 Jo. 39. Cases in C. B. Fawcett v. Catton.

Though it appears by Dyer . . . that such return was allowed in C. B. to be traversed, yet it had not been practised of late. 2 Vent. 175. in a note there. 2 W. & M. C. B. Anon.

Eyres moved that he might traverse the sheriff's return of a *rescous*; but it was denied by Holt Ch. J. who said, he had indeed known it allowed in one case; but there are many authorities, and the constant practice to the contrary. Comb. 295. Mich. 6 W. & M. in B. R. The King and Queen v. How & al.

29. The sheriff returned *quod mandavi ballivo libertatis de N. &c. qui sic respondit, that at another time the defendant was committed to ward by auditors upon arrears of account, and the bailiff brought in his body, and the defendant said, that no such account; and he shall have the plea, per Cur. notwithstanding the return of the sheriff; for his return shall conclude no man. Br. Averment contra, &c. pl. 22. cites 18 E. 4. 5.*

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30. The plaintiff in *libertate probanda* had process of contempt against the sheriff upon his surmise, and contrary to the return of the sheriff; quære the reason, and it seems to be in favorem libertatis. Br. Surmise, pl. 7. cites 18 E. 4. 6.

Br. Villeinage, pl. 45. cites S. C. — Br. Averment contra, &c. pl. 23. cites S. C.

31. In redisseisin the sheriff is judge and officer of record, and in writ of inquiry of waste, and therefore if he returns *that he came to the land*, the other cannot assign for error, that he did not come to the land according to his return; for he cannot contradict the record. Br. Office and Officer, pl. 42. cites 7 H. 7. 4.

Acts which a sheriff or other officer does as ministerial may be averred

against, but not against acts done judicially, and by one as judge; per Popham. Cro. J. 12. Pasch. 1 Jac. B. R. Arundell v. Arundell.

32. Where the sheriff returns *quod averia elongata sunt*, and after, upon the withernam, the party appears, the defendant may claim property before avowry, and yet the sheriff returned *quod averia elongata sunt*; per Pigot. And per Brian Ch. J. this is true; for it is not contrary to the return of the sheriff. Br. Averment, pl. 34. cites 20 E. 4. 11.

But Brooke makes a quære, if the sheriff return in *replevin quod averia elongata sunt*; if

the defendant shall say, that they are dead in pound overt. Br. Averment contra, &c. pl. 31. cites 20 E. 4. 11.

33. A man cannot take averment contrary to the return of the sheriff nor bishop; for they are only officers of the court, and have no day in court to answer the party, nor the Court cannot compel them to answer without original against them to give them day in court; *quod nota*, per Cur. Br. Averment contra, &c. pl. 14. cites 21 H. 7. 8.

As in quare impedit, the plaintiff recovered by title of grant of the next presentation, and had writ to the bishop, who returned that the presentee of the disturber had resigned, and another is in; and the plaintiff was not permitted to have the averment that he had not resigned, but had quare non admittit against the bishop; for the bishop or sheriff, who makes return as officer, have no day in Court; therefore averment, or issue cannot be taken against them. Br. Averment, pl. 23. cites 21 H. 7. 8. — Br. Quare non Admittit, pl. 2. cites S. C. — Br. Issues Joines, pl. 77. cites S. C.

tion, and had writ to the bishop, who returned that the presentee of the disturber had resigned, and another is in; and the plaintiff was not permitted to have the averment that he had not resigned, but had quare non admittit against the bishop; for the bishop or sheriff, who makes return as officer, have no day in Court; therefore averment, or issue cannot be taken against them. Br. Averment, pl. 23. cites 21 H. 7. 8. — Br. Quare non Admittit, pl. 2. cites S. C. — Br. Issues Joines, pl. 77. cites S. C.

34. If the sheriff makes a sale upon a *fieri facias*, and averment does not lie that he sold the goods for a small value; for he is a sworn officer, and a public minister, and so differs from the case of an executor. Jenk. 189. pl. 89. cites Keylw. 64.

35. The statute 14 E. 3. 18. helps, where upon the sheriff's return, *land or the issues of land are to be lost*, or the body imprisoned; or although the writ be not returned at all; for the party has day in court upon the roll, and the defendant may appear, and aver against it. Jenk. 143. pl. 98.

36. If the sheriff makes a false return that *I am summoned, whereby I lose my land*; yet because of the inconvenience of drawing

Jenk. 143. pl. 98. Contra.

ing all things to uncertainty and delay, if the sheriff's return should not be credited, I am excluded of my averment against it, and am put to mine *action of deceit* against the sheriff and summoners. Bac. Elem. 29.

37. If a *partition* be by writ, although it be *unequal*, it may not be avoided by averment, for such averment against the return of a sheriff shall not be good. Heath's Max. 41. cites Co. Litt. 171.

But if it be such as is not definitive, as upon a rescous, or the like, there an

38. No averment will lie against such a return as is *definitive to the trial of the thing returned*; as the return of a *sheriff upon his writs*, the return of the *mayer, aldermen and sheriffs of London upon a writ of *habeas corpus* sent to them, and the like. Heath's Max. 39. cites D. 348. 177.

averment and a trial upon it may lie. Heath's Max. 39.

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An Averment lies in *favorem vitæ* against the sheriff's return.

40. In an *appeal of death* the 2 Ch. Justices inclined, that the defendant might have *traversed* the return of the sheriff *in favorem vitæ*. D. 248. b. 249. a. Hill. 18 Eliz. pl. 14. Howell v. Fortescue.

Jenk. 143. pl. 98. — S. P. Heath's Max. 39.

Cro. E 371. pl. 14 Hill. 37 Eliz. B. R. S. C. by name of COLLET v. MARSH, the Court

41. Error upon *recovery* in writ of *doorer*, because the tenant was *not summoned by 15 days, nor proclamation made at the church-door, according to the statute of 31 Eliz. cap. 3.* but because the sheriff had returned him summoned and proclaimed, the Court adjudged accordingly, and left the tenant to take his *remedy against the sheriff*. Mo. 349. pl. 467. Trin. 35 Eliz. Corbet v. Marsh.

upon motion doubted thereof. But Ibid. 397. Trin. 37 Eliz. B. R. the judgment was affirmed by all the other justices. Contra Gawdy. But Popham and Fenner conceived, that the party here might have a *writ of deceit* if the proclamation or summons were not made according to the statute; for then he is not summoned according to law: but Clench and Gawdy e contra, because it is a good summons by the summoners upon the land. — Goldsb. 128. pl. 22. S. C. accordingly.

Ibid. says, a precedent was shewn in 35 Eliz. Arkinsal v. Palmer. — In *aviz laica*

42. Upon a *vi laica amovenda* the sheriff returned, *non inveni vim laicam neque armatam potentiam*; but it appearing to the Court of B. R. upon *affidavit*, that the person was turned out of possession, a writ of restitution was awarded. Mo. 462. pl. 649. Hill. 39 Eliz. Roberts v. Agmondesham.

a *movenda* the sheriff returned, that he found 5 persons by name keeping the possession with force, but that he did not attach them because they did not resist him, but fled and departed; upon which return the writ being filed in B. R. the defendant made affidavit, that the sheriff removed him with force and put the plaintiff in possession by colour of the writ, and therefore prayed **restitution*, which the Court denied, but ordered the writ and return to be filed there, and the plaintiff to move in Chancery for restitution upon the affidavit; which was done, and restitution was awarded to the defendant. Mo. 782. pl. 1083. Trin. 4 Jac. in Canc. in the case of BIRD v. SMITH, cited as of the same term between Binfield and Beclis. — * See Restitution (E) Wilkinson's case.

43. Upon a *scire facias upon a recognizance against the heirs and tertendants* of H. the sheriff returned C. *tertenant of the manor of A. and summoned, who appeared and pleaded jointenancy with two others in abatement*. It was argued, that this plea is *not contrary to the return* of the writ, but consists with it; for the plea admits that C. was tenant, but not sole tenant, and should he not plead it he can never have *audita querela* or contribution against the others, in case his land should be extended; and of this opinion was Owen J. before

before whom this matter was argued in Chancery, and so the *scire facias* was abated; and this was done upon prayer of the counsel of the plaintiff for expedition sake to have a new writ. Mo. 524. pl. 693. Hill. 39 Eliz. Clerk v. Hardwick.

44. If the return be a *collateral matter*, averment may be against it. Ow. 132. Trin. 43 Eliz. C. B. George Brook's case, alias Gibson v. Brook.

45. In *scire facias* against the *tertenants* upon a judgment in debt, the sheriff returned *scire feci J. B. tenenti unius messuagii, &c.* And the said J. B. came and pleaded that he was not *tertenant*, which was against the return of the sheriff. Upon demurrer it was adjudged for the plaintiff, that it was not any plea, and that the plaintiff might have taken execution at his peril. Cro. E. 872. pl. 9. Hill. 44 Eliz. C. B. Flud v. Pennington.

46. Though a man cannot aver against the return of the sheriff, yet he may say that he who endorsed his name on the writ, &c. was not sheriff; because at common law, till the statute of 12 E. 2. cap. 5. no sheriff nor other officer used to put their names to the returns; and therefore this averment, that he who made the return was not the true officer, is not taken away by the statute, but remains as it was at common law. Yelv. 34. Pasch. 1 Jac. B. R. in the case of Arundell v. Arundell.

47. In case the plaintiff declared, that H. entered into a *recognizance* to him, and that he took out an *elegit*, and the defendant being sheriff took an *inquisition* upon it, and thereupon the land was extended, but he refused to deliver it to the plaintiff; but returned, that he had delivered it; and the plaintiff averred, that he had not. Upon not guilty pleaded, the plaintiff had a verdict; but it was moved in arrest of judgment, that an averment may not be against the return of the sheriff. To which it was answered, that it may in another though not in the same action. It was agreed to have a new trial; but otherwise the Court seemed of opinion, that the plaintiff should have judgment. Winch. 100. Mich. 22 Jac. C. B. Sheis v. Glover.

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(O. 2) In what Cases a Man may appear or be received against the Return of the Sheriff.

1. *SCIRE facias* against L. B. *custodem de aula de P. W.* in Cambridge, and the scholars of the same, was brought in Norfolk upon recovery of an annuity, and the sheriff returned, *quod scire feci præf. L. B. & scholaribus, &c.* And the said L. B. came and said, that he was the same person who was warned as *custos*, and said, that he was not *custos* the day of the writ, nor ever after, judgment of the writ; and the issue was permitted; but it was in a manner gratis. Brooke says, et sic vide hoc contrary to the return of the sheriff. Br. Averment contra, &c. pl. 4. cites 34 H. 6. 53.

2. *Scire facias* upon recovery of annuity, the sheriff returned, *nihil habet, nec est inventus, &c.* And per judicium, though the party

party has no day in court by garnishment, yet because it is a mischief, inasmuch as the *plaintiff may have execution upon the first nihil returned* in a *scire facias* upon a recovery, therefore he shall be received to plead. And the same law at the *capias* and *exigent*. Br. Averment contra, &c. pl. 20. cites 8 E. 4. 15.

3. Annuity against a parson; the sheriff *returned, quod clericus est beneficiatus non habens laicum feodum*; and the defendant came and would have appeared. And per Littleton, he cannot appear; for the writ is not served against him, and no mischief; for *capias* shall not issue as here. But per Choke, he shall be received as here; for the writ is served, though he be not summoned; and upon this return process shall issue to the ordinary to sequester the profits of the benefice by *venire facias clericum*. Br. Averment contra, &c. pl. 21. cites 11 E. 4. 9.

4. And in *quare impedit* and action of *waste* returned *nihil*, he shall have such process as if the return had been *summoneas*. But contra where it is returned *tarde* or *quod querens non invenit plegios de proseguendo*; for there shall be a new summons awarded, and he shall be received as well where he is to be vexed in his goods as in his body. Per Choke; quod Brian J. concessit. Br. Averment contra, &c. pl. 21. cites 11 E. 4. 9.

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(P) Statutes relating to Returns.

Ld. Coke
2 Inst. 451.
says, there
are 5 mis-
chiefs, or
rather abu-
ses of the-

1. 13 Ed. 1. **F**ORASMUCH as justices, to whose office it belongs to minister justice to all, that sue before them, are * many times disturbed in due execution of their office, for that sheriffs do not return writs original and judicial; and also for that they make false returns unto the king's writs.

recited and provided for; the first was, that the sheriff returned not the writs to him directed, but embezzled the same, and commonly the demandant or plaintiff for default of proof was without remedy, or else without the effect of a just remedy being against a sheriff; for which a remedy is provided for by this act in manner ensuing.

* Anciently they had castles, fortresses, and liberties, whereby they resisted the sheriff in executing the king's writs, which creating great inconvenience this statute hindered the sheriff from returning rescues to the king's writs of execution. The judges construed these words to extend only to executions, and not to writs on mesne process, and that the sheriffs were not obliged to carry the posse comitatus where the man was bailable; for they did not presume that in such cases the king's writ would be disobeyed. G. Hist. of C. B. 20.

Our lord the king has provided and ordained, that such as do fear the malice of sheriffs shall deliver their writs original and judicial in the open county, or in the county where the collection of the king's money is; and may take of the sheriff or under-sheriff, being present, a bill, wherein the names of the demandants and tenants mentioned in the writ shall be contained: and at the request of him that delivered the writ the seal of the sheriff or under-sheriff shall be put to the bill for a testimony, and mention shall be made of the day of the deliverance writ. And if the sheriff or under-sheriff will not put his seal to the bill, the witness of knights and other credible persons, being in presence, shall be taken, that put their seals to such bill.

statute of 3 E. 3. 5. [which see after] the sheriff and under-sheriff are commanded, that they shall receive the said writs and make a bill. 2 Inst. 451.

So as now it is a contempt in the sheriff or under-sheriff if he make it not; and in default of them, it shall be also a contempt in the others appointed to seal it, if they refuse. 2 Inst. 451, 452.

In this special case the demandant or plaintiff shall have an *action against the sheriff for not returning the writ*, whereas regularly for not returning of a writ, the sheriff shall be *amerced quousque*; but for a false return, or for embezzling of a writ, an action does lie at the common law against the sheriff. 2 Inst. 452.

And the demandant or plaintiff, if he fear the malice (as this act speaks) of the sheriff, he may cause the sheriff or under-sheriff to be called into the court, and deliver the writ to him of record, that he may take the benefit of this statute. 2 Inst. 452.

And if the sheriff will not return writs delivered unto him, and if the sheriff complaint thereof be made to the justices, a writ judicial shall go unto the justices assigned to take assises, that they shall enquire by such as were present at the deliverance of the writ to the sheriff, if they knew of the deliverance, and an inquest shall be returned: and if it be found by the inquest, that the writ was delivered to him, damages shall be awarded to the plaintiff or demandant, having respect to the quality and quantity of the action, and to the peril that might have come to him by reason of the delay that he sustained. If the sheriff seizes, and will not return the writ, the party shall have writ directed to him to make him return the writ;

quod nota. And this seems to be by certiorari. Br. Return de Briefs, pl. 74. cites 30 Aff. 35. — *The same of outlawry.* Ibid.

Bill upon deceit was brought against the sheriff, where the plaintiff sued exigent against 5 in appeal of maibem, which was delivered to the sheriff at H. in the county, and 4 rendered themselves to the sheriff, and the 5th was outlawed, and the sheriff did not return the writ. Hail said, that the sheriff bailed the writ to J. S. who was robbed of it by one named in the exigent, judgment, &c. And because it appeared that the writ was embezzled, and by him named in the exigent, who ought to have been held in ward of the sheriff; and because it was not done, therefore it was awarded, that the plaintiff recover 10l. damages. and the body be sent to prison till he made fine to the king, and grace to the party. Br. Barre, pl. 67. cites 41 Aff. 12.

† If the sheriff takes a man by capias, and does not return the writ, the party who was arrested shall have writ of trespass, or of **false imprisonment*, and the other party shall have recovery also. Br. Trespass, pl. 137. cites 21 H. 6. 5. Per Paston.

* S. P. Per Brian. And per Keble, this is true; for the capias is, *ita quod habeas corpus ejus hic, &c.* Br. Trespass, pl. 267. cites 3 H. 7. 3.

Where the sheriff serves a *feri facias*, and levies the sum, and does not return the writ, the party may have an *action of trespass against him for the levying*. Br. Trespass, pl. 211. cites 21 H. 7. 22. Per King's Justice.

An attachment was delivered to the sheriff to execute, who did not return the same; and upon affidavit of the delivery, a day was given to return the writ upon pain to be amerced 5l. Cary's Rep. 109. cites 21 & 22 Eliz. Crompton v. Meredith. — So upon affidavit made of the delivery of an *extent* to the sheriff, which he hath not returned; a day was given to the sheriff to return the writ upon pain of 10l. Cary's Rep. 109. cites 21 & 22 Eliz. Hambey v. Wight.

Case was brought for returning a capias utlagatum; Walmesley and Warburton were of opinion, that an action lay not, but that he should be amerced for not returning it, he thereby neglecting the queen's command. But per King'smill, though the queen may punish him for the contempt, yet because the party hath a loss in not returning the writ, he may have an action also. And the Clerks said, there were many precedents that such actions have been brought; wherefore, absente Anderson, adjournatur. Cro. Eliz. 873. pl. 10. Hill. 44 Eliz. C. B. Clarke's case.

*Twas held by Powell, Powis and Gould assenting, (Holt Ch. J. absent) that the Court of B. R. cannot *amerce bailiffs of liberties*, for not returning of writs, &c. but the Court can make a rule for them to make a return, and for disobeying that, bring them into contempt; but sheriffs and all that are officers of the Court, the Court can amerce. Lately indeed we did amerce the bailiff of Westminster; but that was wrong. 11 Mod. 272. pl. 16. Hill. 8 Ann. B. R. Anon.

It was moved for a peremptory rule upon a sheriff to return a writ. The Court said, that there appeared so manifest an oppression in sheriffs, by their not executing the process duly as it ought to be, that they had resolved to grant these *peremptory rules with costs*; accordingly they did so in the present case. 2 Barnard Rep. in B. R. 28. Hill. 5 Geo. 2. 1731. Anon.

And by this mean there shall be remedy when the sheriff returns that he came too late, whereby he could not execute the king's commandment. The second mischief was, the sheriff would return a *tarde*, which by this purview is prevented; and so it is if the writ be delivered to the sheriff of record, as has been said. 2 Inst. 452.

Writ was returned in B. R. that the plaintiff delivered to the sheriff by billet according to the statute of Westminster 2 cap. 39. and because the sheriff refused to put his seal, others put their seals according

to the statute, and the sheriff returned the writ tarde, and the plaintiff prayed writ to the justices of assize to enquire, &c. which was enquired, and found for the plaintiff, to the damage of 50s. and it was returned in B. R. and there the plaintiff recovered his damages taxed, &c. *Quære*; for it is only an inquest of office; and it was said that the justices of assize might have given judgment in pais upon it; quod nota. Br. Return de Bricfa, pl. 72. cites 29 Ass. 58.—Br. Office & Off. pl. 40. cites S. C. says that judgment was given for the plaintiff to have damages, but not double damages; for it is not within the statute.

Here is the third mischief, that great delays are used by the false returns of sheriffs in making of mandates to feigned liberties, supposing them to have return of writs, where in truth there be no such liberties; for redress whereof the remedy follows. 2 Inst. 452.

*Oftentimes also pleas be delayed, by reason that the sheriff returns that he has commanded the bailiffs of some liberty, which * did nothing therein, and names liberties that never had the return of writs.*

* This nihil is to be understood not only where nothing at all is done, but also where the bailiff of the liberty makes an *insufficient return*, for that is *nihil* in law, and therefore a non omittas, &c. shall be thereupon granted; for, idem est nihil, insufficienter dicere. 2 Inst. 453.

** Albeit it be inrolled in the Chancery, that *Whereupon our lord the king has ordained, ** that the treasurer and barons of the Exchequer, shall deliver to the justices, in a roll, † all the liberties in all shires that have return of writs.*

such a man has return of writs, yet is not that within the purview of this act, for that the record of the court of Exchequer is only prescribed by this act; and therefore a certiorari may be awarded out of the Chancery to the Exchequer to the treasurer, that he bring in the roll of the liberties in his hand to the justices, before whom the return is made. 2 Inst. 452.

† This must be understood of a bailiff of a franchise or seignior, which have return of writs, and not to a bailiff created *itinerant*, (for example) in the county of S. and to have return of all writs, and execution of the same by the king's letters patents; for such a grant is void; for in effect it takes away the office of the sheriff; and therefore where such a return was made upon a mandate to such a new-found bailiff, the Court was in purpose to have punished the sheriff by this branch of this act, tanquam exheredatorem domini regis. 2 Inst. 452.

[206] *And if the sheriff answer that he has made return to a bailiff of another liberty than is contained in the said roll, * the sheriff shall be forthwith † punished as a disheritor of our lord the king and his crown.*

* Because he feigns a liberty or franchise

against the king, to the disherison of the king and of his crown, forasmuch as no man can have such a liberty or franchise but from the crown. 2 Inst. 452.

† This punishment shall be by ransom and imprisonment. 2 Inst. 452.

Here is the 4th mischief, that where there was indeed a bailiff of a liberty who truly had return of writs, yet he upon a mandate to him would do nothing: remedy is hereby provided that it shall be commanded to the sheriff, *And if peradventure he return that he has delivered the writ to a bailiff of some liberty that indeed has return, the sheriff shall be commanded that he will not spare for the foresaid liberty, but shall execute the king's precepts, and * that he do the bailiffs to wit, to whom he returned the writ, that they be ready at a day contained in the writ, to answer why they did not execute the king's precept. . And if they were at the day, and acquit themselves that no return was made to them, the sheriff shall be forthwith condemned to the lord of the same liberty, and likewise to the party grieved by the delay, for to render damages.*

quod non omittat, &c. quin exequatur præceptum Domini regis, &c. 2 Inst. 453.

This branch concerning the *non omittas*, is in confirmation of the * common law; and therefore Bracton, who wrote before this statute, treating of this matter, lays, et quo casu cum ballivi nihil inde fecerint, propter defectum eorum, præcipiatur vicecomiti, quod non omittat propter libertatem talem, quin, &c. 2 Inst. 453.—* These liberties being erected by grant from the crown, unless they have been allowed in Eyre when such grants have been shewn, they cannot be prescribed for; it is true the *non omittas* is mentioned by Bracton and Fleta, which makes Lord Coke suppose it was at common law; but it is to be observed that there were systems of law, which, like Britton and Glanvill, were published by Edward the 1st. and composed of such customs as had been used, and likewise of such laws as he intended; but these of them that related to baronage were

were generally enacted by the 1st statutes made by their own consent; therefore after this statute, if the sheriff entered into the franchise without a non omittas, he was subject to an action, but the execution was good, because he had an authority to levy the money on the goods wherever they were found within the county; for erecting the franchise did not exclude it from the king's process sent to the sheriff of that county; but the fee-farms being payable to the king, if they were not paid in by the bailiffs at the Exchequer, process went out to levy them, which would have been improper, if such franchise had been exempt from the county: hence the notion came, that the king's process was a non omittas of course, because the king was to levy his fee-farm from the bailiwick; and in the writs at the suit of a common person, it is good, the sheriff being liable to an action, which is on the rule quod fieri non debet, factum valet, the money is well levied, though the sheriff is subject to make the lord amends for entering his liberty; but when there is a non omittas propter aliquam libertatem, there by this statute he is to enter the franchise. G. Hist. of C. B. 22, 23.

† This seems to be added by this branch to the common law. 2 Inst. 453.

And if the bailiffs come not in at the day, or do come, and do not acquit themselves in manner aforesaid in every judicial writ, so long as the plea hangeth, the sheriff shall be commanded that he shall not spare the liberty, &c.

After the conquest the lords (whose private jurisdictions

were then retrenched, as inconvenient to the Normans) to maintain their authority within their neighbourhood, purchased the bailiwicks of the hundreds, sometimes for years, for life, in fee, at a certain rate in fee farm; and for this they had the Court-Leets, the assises of bread and beer, and the amerciaments, (viz.) the fines for the breach of any of the articles properly examinable in the leet; and they likewise had the return of the writs; so that the lord appointed his bailiff to execute the king's writ within his franchise, and though the sheriff, who is the ordinary bailiff of the crown, could not enter the same, which was a great obstruction to the publick justice, to remedy this, Westm. 2. cap. 29. enacts, that if such bailiffs give no answer to the sheriff, the Court should grant a special warrant with a non omittas, which authorised the sheriff to enter the franchise, by which it appears that the king's bailiff was to answer the sum due from the franchise, yet they were bailiffs to the sheriff, to answer the king's process sent from him to them. G. Hist. of C. B. 21, 22.

*Many times also sheriffs make * false returns, as touching these articles quod de exitibus, &c. returning sometime, and lying, that there be no issues, sometime that there are small issues. when they may return great, and sometimes do make mention of no issues: wherefore it is ordained and agreed, that if the plaintiff demand oyer of the sheriff's return, it shall be granted him.*

This is the 5th mischief, that the sheriffs would return too small issues, in which

case, by the common law the plaintiff could not have an averment against the return of the sheriff; for the sheriff is but an officer to the Court, and has no day in Court to answer to the party; but this is remedied in this case by this branch. 2 Inst. 453.

* This branch mentioning sheriffs, extended not to the bailiffs of liberties, which is holden by the statute of 1 E. 3. 2 Inst. 453.

*And if he offer to aver, that the sheriff might have returned greater issues unto the king, he shall have a * writ judicial unto justices assigned to take assises, that they shall inquire in presence of the sheriff (if he will be there) of what and how great issues the sheriff might have made return from the day of the writ purchased unto the day contained in the writ.*

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† See (O) — It was said by diverse justices, that before this statute no averment was given

against the return of the sheriff. And Brook makes a quære, if other averments are taken by the equity hereof; and says, it seems they are not. Br. Averment contra, &c. pl. 17. cites 5 E. 4. 80.

The plaintiff must in his averment allege what the value of the issues be. 2 Inst. 453.

Averment of trope petit issues lies against the sheriff's return of them upon a juror, &c. as well as upon the party, &c. Fitzh. Tit. Averment, pl. 45. cites Mich. 11 E. 2.

As the sheriff returned issues of one juror to 10d. and another to 6d. and it was prayed that he might be amerced; for that he might have returned issues 20s. It was objected, that this statute is to be intended where the party is delayed by the return, and to make the party come into Court, and not as to making process against the jurors. But per Parsey: though the statute does not say expressly, that averment shall be against the sheriff where he returns petit issues upon a juror, yet he said it was made to oust delays by false returns, and the party is as much delayed where

where he returns petit issues upon a juror, as where he returns petit issues upon the defendant; and in B. R. it is the common course to take the averment. And Kirton said it was reasonable that it should be the same in this Court also, and commanded the clerks to enter the averment; for if it be granted by law, we will surcease when our masters come, &c. Fitzh. Tit. Averment, pl. 26. cites Mich. 2 R. 2.——But Lord Coke says it is holden, that this act does not extend to the return of issues upon jurors after issue joined. 2 Inst. 453.

In debt; at the distringas the sheriff returned, that he had sent to the bailiff of the franchise of C. who returned issues 2s. which issues the sheriff returned as of his own return; whereupon a writ was prayed to make the sheriff come to answer, and averred that he had land out of the franchise, whereof he might have returned issues of 10l. Herle asked, why they did not pray a writ to take the inquest en pais before the justices, according to the statute? To which it was answered, that the statute mentions where the sheriff returns the writ himself, and as of himself, but that this was only the return of the bailiff; but Herle said that it is the same if the sheriff had returned nothing and the writ was granted. Fitzh. Tit. Averment, pl. 48. cites Mich. 19 E. 2.——and Ibid. pl. 49. to the very same purpose, cites S. C.

Quare impedit; the plaintiff recovered against the bishop, and distringas episcopum issued to disincumber the church, and the sheriff returned in issues 20s. and the plaintiff averred, that he might have returned greater issues, and prayed writ to the justices of assise to inquire, and had it; and so it seems that the sheriff ought to return all the issues, which arise upon the land of the bishop in this county, between the teste of the distringas and the return; for these words (*might have returned greater issues*) cannot be referred to other certainty, but to this. Br. Issues returned, pl. 4. cites 21 E. 3. 30. Fitzh. Tit. Averment, pl. 47. cites S. C.——S. P. 2 Inst. 453.——The sheriff ought to return in issues as much as the party may perceive from the day of the teste of the writ till the return, and the value of his goods which he had by the same time, except equitatum, apparel and household-stuff; and if he does not, he shall answer of the surplage by this statute, per Fitzh. justice, & nullus negavit; and because the sheriff had returned but 4d. he prayed to amend his issues, and was suffered; quod nota. Br. Issues returned, pl. 1. cites 27 H. 8. 3.

The sheriffs returned upon one 40d. in issues, and the party came, and took averment that mesne between the teste and the return he might have returned 100s. in issues, the Court bid him sue a writ to the justices of assise to inquire of it. 20 H. 6. 25. pl. 10.

The trial of the averment in this case shall be by a jury; for the sheriff is sued by original writ for the false return, and has a day in court to plead on. Jenk. 143. pl. 98.

Though the plaintiff may have the averment of two petit issues returned by the sheriff, yet the defendant shall not by this statute. Fitzh. Tit. Averment, pl. 16. cites Pasch. 34 H. 6.

A man shall not have averment by this statute against the bailiff of the sheriff, that he might have returned greater issues, but only against the sheriff himself, &c. Fitzh. Tit. Averment, pl. 43. cites Iter North 3 E. 3.

* See the book of entries for the judicial writ to the justices of assise. 2 Inst. 453.

As if the sheriff returns but 10s. issues, and it be found be-

And when the inquest is returned, if he have not before answered for the whole, he shall be charged with overplus by estreats of the justices delivered at the exchequer, and nevertheless shall be grievously amerced for the concealment.

fore the justices of assise, that the issues amounted to 50s. the sheriff shall be charged with 40s. by this branch, and so after that rate and proportion. 2 Inst. 453.

[208] And let the sheriff know that rents, corn in the grange, and all moveables, (except horse-barnes, and household stuff) be contained within the name of issues.

By this branch is explained what shall be accounted issues for the better direction of sheriffs in this case, that is to say, not only the rent and revenue of the land but the corn in the grange, and all other moveables, as hay in the barn, and other moveable or personal goods whatsoever, except those things belonging to his riding, his apparel, and utensils of house; and certainly this is a good and necessary law, if it were put in execution according to the purview of this act. 2 Inst. 454, 455.

And the king has commanded that sheriffs shall be punished by the justices once or twice (if need be) for such false returns. And if they offend the 3d time, none shall have to do therewith but the king.

2. 12 E. 2. cap. 5. Because it is many times complained in the king's court upon returns, that bailiffs of franchises (having full power to return the king's writs) have delivered to sheriffs that have been

been after changed, and otherwise returned into the king's court, to the great damage of some of the parties, and the delay of right,

It is agreed, that of returns which hereafter shall be delivered to the sheriffs by bailiffs of such franchises, an indenture shall be made between the bailiff of the franchise by his proper name, and the sheriff by his proper name.

And if any sheriff change the return so delivered to him by indenture, and be thereof convicted at the suit of the lord of the franchise, of whom he received the return, if the lord have had any damage, or if his franchise be imbletished, and at the suit of the party that has sustained loss through that occasion, he shall be punished by the king for his false return, and shall yield unto the lord and to the party double damages.

Also it is agreed, that from henceforth sheriffs and other bailiffs that receive the king's writs returnable in his court, shall put their own names with the returns, so that the Court may know of whom they took such returns, if need be. And if any sheriff or other bailiff leave out this name in his returns, he shall be grievously amerced to the king's use.

This statute will expressly, that the sheriff shall put his name to the returns; so that it seems

it was otherwise before. Br. Return de Brief, pl. 81. cites 41 Aff. 29.—Exception was taken that no name was put to the certiorari returned out of the treasury into the Chancery, & non allocetur; for no minister shall put his name by the common law, but by the statute the sheriff shall put his name to his return, and does not speak of any other officer; nota. Br. Return de Briefs, pl. 48. cites 8 H. 6. 27.

If a mittimus be returned with fine in B. R. by the treasurer and baron of the Exchequer; this is well, though they do not put their names to it; contrary of the sheriff by the statute. Br. Return de Briefs, pl. 129. cites 11 H. 6. 44.

In debt upon the exigent, a writ of proclamation issued according to the statute, and it was returned served, but the sheriff had not put his name to the return; and for this cause the outlawry was challenged. Dyer, Brown, and Weston thought this was no cause to reverse the outlawry, it appearing by the return that he was lawfully demanded; for the words are ad comitatum meum tentum, & proclamari feci: so as it appears that it was made by the sheriff, and this statute only imposes a penalty upon the sheriff, if he puts not his name to the return of the writ, but that the want thereof is not error; but if upon the back of the writ nothing be writ nor returned, this will be error. Welch and Harpur e contra, and that * 26 H. 8. 3. an exigent was returned served, and the name of the sheriff omitted in the return; and this held error. And the clerks said that there were many precedents where the returns for this cause were adjudged insufficient. Whereupon Dyer said, we will be advised of it. Mo. 65. pl. 176. Trin. 6 Eliz. Anon.

* Theloall's Dig. 385. pl. 13. cites S. C. and P.

The name of the sheriff was not to the *disfringas*, nor to the *tales* awarded upon it, and it was tried by nisi prius. It was insisted that the sheriff not putting his name does not make the return ill, and that it is helped by 32 H. 8. which helps insufficient returns, and no writ returned; but Curia contra, for of necessity the name of the sheriff is to be to the return, otherwise it appears not by what warrant it came in; and otherwise any man without the sheriff might return writs, which would be a great inconvenience, and the statute does aid only insufficient returns, or when the writ cannot be found; so it may be intended it is imbezzled: but here it appears, and that it was never returned, wherefore it cannot be good. And it was said it was so ruled in C. B. 35 Eliz. WALKER's case, and also in this Court, between MARK AND LANCASTER; and for this cause the judgment was said. Cro. Eliz. 310. pl. 20. Mich. 35 & 36 Eliz. in B. R. Stainer v. James.

Disfringas directed to the coroners was returned by them with their names subscribed, but leaving out the name of office, (viz.) coronatores, &c. and this was adjudged erroneous; but if they had not put their proper names, the return had been good, because coroners and the Chamberlain of Chester are not within this statute,* which requires sheriffs to put their names to returns. The common law required the name of office to be subscribed, whether it was sheriff, coronet, chamberlain, &c. so at this day the sheriff is bound to put his surname and name of office, but other persons only their names of office. Mo. 548. pl. 754. Hill. 40 Eliz. Scrogs v. Spencer.—Cro. E. 703. pl. 23. Mich. 41 & 42 Eliz. B. R. S. C. and P. and that the ven. fac. was returned by them and their names, viz. A. and B. were writ, and also the word coronatores added, which was omitted upon the habeas corpora, on which was indorsed A. and B. only. It was moved not to be error, because before this statute the sheriff need not have put his proper name nor name of office to his return, and this statute extends only to the sheriffs and bailiffs of franchises; so the coroners to this day are out of the statute: and at the common law it

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it is well enough, for it was not usual to put the sheriff's name to returns; and in proof thereof diverse precedents were shewn by Agar Deputy Chamberlain of the Exchequer, many of which were writs of assise, the one was in 5th Ed. 2. Assise against the abbot of Abington and one J. S. his commoigne, and in none of the writs the sheriff's proper name or office was returned. And upon these precedents shewn the Court conceived it to be well enough, and no error; for when a writ is returned, it is intended to be by the very officer of the Court, who ought to do it, which is the reason, that at the common law the sheriff's name needed not to be put to any return; and this reason holds here. But they all held, that if their names ought to have been here, then it is not aided by the statutes 34 H. 8. nor 18 Eliz. And they held, that the statute of 12 Ed. 2. did not extend to coroners; but they would advise.

Venire facias was returned thus, (viz.) *Per Thomam Ravenscroft Vicecomitem, istud breve cum pannello annexo mihi deliberatum fuit per Thomam Hammer Militem nuper vicecomitem, in exitu ab officio suo & sic indorsatur Tho. Hammer nuper vicecomes.* It was objected, that it appears that it was returned by one who had no authority; for the saying (*nuper vic.*) excludes him from being sheriff, when he made the return. But 3 justices held that the return was good enough; for he needs not allege his name of office; and by the statute the adding his name is sufficient, and that need be only his christian and surname, and the addition of *nuper vicecomes* shall be intended that he returned it when he was sheriff, and made that addition when he delivered it to the new sheriff; and so shall not make the return void. But Whitlock J. seemed to doubt; for which reason the Court would further advise. Cro. C. 189. pl. 9. Pasch. 6 Car. B. R. Bethyl v. Parry. — Cro. C. 370. pl. 7. Hill. 15 Car. B. R. Bathell's case. S. P. — 2 Roll. Rep. 219. Mich. 18 Jac. B. R. S. C. [notwithstanding the difference of the years, &c.] but I do not observe that the Court gave any opinion as to the *nuper vicecomitem*. — Palm. 151. Mich. 18 Jac. B. R. S. C. And Dodderidge J. said the subscribing his christian and surname, without saying *vicecomes*, is error; and Montague held, that it ought to appear by the return that he was sheriff at the time; and thereupon they and Haughton agreed the return void, and not aided by the statute; but Montague doubted if the return be erroneous upon the statute of York, because the common law was, that a return without a name was good; and the statute of York says, that *the sheriff shall, &c. and if he doth not*, then it inflicts a penalty upon him; and so it seems that the return is not void, but only that the sheriff shall be punished. But all the other justices said, that the common law is changed by the first words, viz. *The sheriff shall, &c.* and the penalty is in terrorem of the sheriff, and that the statute was always expounded so, and that the practice has been accordingly. — Roll. Rep. 210. S. P. in S. C. And Chamberlain J. said that the judges of C. B. would cause the sheriff's name, before the judgment given, to be subscribed to the return, though it was omitted before at the time of the return. But the Reporter says, that 5 Rep. 41. ROWLAND'S case, is against this opinion of Chamberlain. — Palm. 191. S. C. but not S. P.

A judgment given in the cinque ports, was removed by a certiorari into B. R. and thereupon issued a *scire facias* for the defendant to shew cause why the plaintiff should not have execution upon the judgment; defendant appears and demurs, and takes exception that the sheriff in his return is not named knight and baronet, neither does he name himself by his name of baptism and surname: but the Court over-ruled these exceptions, and gave judgment for the plaintiff. Style 9. Pasch. 23 Car. Rook v. Knight.

In an appeal of murder it was objected that the return of this was insufficient, as entered on record, for the default of the sheriff's name subscribed; for the words *respons. B. F. and E. P. Vic. &c.* on the back of the writ, are not sufficient; but their names ought to be subscribed within the return itself, (viz.) at the bottom of the schedule, which is strictly required by the statute of York, by which it is enacted, that the sheriffs shall set their names to their return, in pain to be grievously amerced to the king's use. But Holt Ch. J. held the return of the schedule good, without the names of the sheriff's subscribed; for their names on the back of the writ is sufficient. Carth. 54. Trin. 1 W. & M. B. R. Orbell v. Ward.

A return of a *mandamus* will bind a corporation, though not sealed with their common seal, because this act is upon record, and they are estopped to say it was not their return, because it is said, *responsio majoris, &c.* upon record; per Cur. And they held further, that the mayor is not obliged to subscribe his name; for at common law no officers were obliged to sign their returns. It is true, the statute of York obliges sheriffs to sign their returns, but it does not extend to any other officers, 2 Ld. Raym. Rep. 848. Mich. 1 Ann. The Queen v. Challice the Mayor of Thetford. — 1 Salk. 192. pl. 4. S. C. accordingly, and that the statute of York extends not to a coroner, mayor, or other officer. — S. P. Ld. Raym. Rep. 223. Pasch. 9 W. 3. The King v. the Mayor, &c. of Exeter.

* In retro comitatu, viz. After the county court, as to pleas, are ended, and is then held for the collection of the king's money, viz. his green-wax. 2 Inst. 452.

3. 2 Ed. 3. cap. 5. Where it was ordained by the statute of Westm 2. that they which will deliver their writs to the sheriff shall deliver them in the full county, or in the rear county, and that the sheriff or under-sheriff shall thereupon make a bill;

and is then held for the collection of the king's money, viz. his green-wax. 2 Inst. 452.

It is accorded and established that at what time or place in the county a man does deliver any writ to the sheriff or to the under-sheriff, that they shall receive the same writs, and make a bill after the form contained in the same statute, without taking any thing therefore.

And if they refuse to make a bill, others that be present shall set to their seals.

And if the sheriff or under-sheriff do not return the said writs, they shall be punished after the form contained in the same statute.

And also the justices of assises shall have power to enquire thereof at every man's complaint, and to award damages as having respect to the delay, and to the loss and peril that might happen.

(Q) False Return. Remedy. And punished, how.

1. **T**HE vouches in *præcipe quod reddat* shall not wage his law that he was not summoned upon their summons; for he need not save his default at the grand cape ad valentiam, but if he be returned summoned, where he was not summoned, and after grand cape ad valentiam issues, he shall have disceit of the return, &c. Br. Ley Gager, pl. 27. cites 50 E. 3. 16.

2. In *capias* the sheriff returned *mandavi ballivo et quod ipse cepit corpus, sed illud hic habere non potest quia languidus est, &c.* and the feme of the defendant came and said that he is not languidus, but is detained by the bailiff for extortion, and prayed remedy, by which the writ issued to the bailiff to return the body and to appear; and so he did, and upon examination it appeared that the party was not languidus, by which the bailiff was committed to the Fleet to make fine, and the writ against the bailiff was upon pain of 40l. to appear and to bring in the body, &c. Br. Retorn de Briefs, pl. 123. cites 11 H. 6. 42.

Br. Surmise, pl. 19. cites S. C.—
Br. Imprisonment, pl. 107. cites S. C.—S. P.
Br. Imprisonment, pl. 111. cites 24 E. 3.

3. If the sheriff returns *nihil* to any writ in *quare impedit*, writ of *mesne*, and writ of *waste*, yet the plaintiff shall recover. Br. Disceit, pl. 4. cites 27 H. 6. 5.

4. If the sheriff returns that the summoners and veiors are dead, the plaintiff shall not have averment. *Quære hoc.* But see E. 4. fol. that he may have action upon the case against him for his false return. Br. Disceit, pl. 5. cites 33 H. 6. 9.

5. A man shall not have averment contra to the return of the sheriff that, &c. but may have action upon the case against the sheriff, and in this action he may have the averment, but not in the same action in which the return is made. Br. Action sur le case, pl. 91. cites 3 E. 4. 20. Per Danby and Pigot:

6. A. recovers against B. in a *præcipe quod reddat* by default: the writ of deceit in this case is judicial, and issues out of the Common Pleas, and the process is attachment and distress infinite, and is mentioned in the writ; and in this case A. and the sheriff and the summoners and veiors are made parties by this writ, that is, he who was sheriff and made the return of summons, which, by the writ of deceit, is alleged to be false. If the present sheriff did this deceit,

the writ of deceit aforesaid shall be directed to the coroners. Jenk. 122. pl. 46. cites 5 Ed. 4. 93.

7. *If in assise of fresh force, which passed against the defendant, the record makes mention that he had been attached and summoned and he was not attached and summoned, he shall not assign this for error, for it is contra to the record; and then it seems that he is put to his action against the sheriff, who returned it. Per Brook. Br. Error, pl. 116.*

[211] 8. R. C. a commissioner in a commission of rebellion returned a rescue against G. B. who being examined, and his examination referred to the masters of the court, was found to have confessed the rescue, whereupon he was committed to the Fleet, and yet afterwards brought his action upon the case at the common law against the said R. C. for his false return; ordered that a subpoena be awarded against the said G. B. to shew cause why an injunction should not be awarded against him for his stay of action upon the case; but afterwards, viz. 21 Eliz. the defendant was allowed to go forward in his action upon the case at the common law, because *either of the parties there may plead this matter.* Cary's Rep. 152. cites 21 Eliz. Joan Bonvill, widow v. Bonvill and Billingham.

2 Le. 180.
pl. 221. S.
C. in toti-
dem verbis.

9. In action against an executor, who pleaded that he refused, upon which they were at issue, the bishop certified *quod non recusavit*, whereas in truth he had refused before the commissary. The Court was of opinion, that the only remedy for the defendant was by action on the case against the bishop for this false return. Le. 205. pl. 285. Trin. 31 Eliz. C. B. Anon.

Le. 144. pl.
200. S. C.
according-
ly. per tot.
Cur.

10. In trover, the defendant pleaded a recovery against J. P. and that a *fieri facias* was awarded to the sheriff, and after the writ awarded and delivered to the sheriff, J. P. died possessed of the goods, and made the plaintiff his executor, and afterwards the defendant by force of the sheriff's warrant took these goods in execution as baily to the sheriff, and delivered them to him. The plaintiff replies, that the sheriff returned upon the writ *tarde*; and upon this it was demurred in law, one question was, if the false return of the sheriff shall make the baily punishable, for what he did lawfully; for he was a baily errant, and a meer servant to the sheriff, and not a baily of a franchise. And it was held clearly that it should not; for by the execution by the baily the party was discharged of the execution, and therefore it is not reason he shall take advantage against the baily. And it was adjudged for the defendant. Cro. E. 181. pl. 16. Pasch. 32 Eliz. B. R. Parkes v. Mosse.

11. Case; for that upon a capias directed to him against J. S. he made a warrant to a bailiff of a franchise to arrest the said J. S. which was done accordingly, and yet the sheriff returned *non est inventus*. Resolved per tot. Cur. that the action well lay; and Anderson said, that if the sheriff had returned that he had sent to the bailiff of the liberty, who had given this answer, that he had arrested the body, it had been good, and the sheriff had been discharged, and the process should have issued against the bailiff of the liberty to bring in the body. Cro. El. 729. pl. 67. Mich. 41 & 42 Eliz. C. B. Hawkins v. Mildmay.

12. An

12. An officer of the Court of admiralty was committed by the Court of C. B. to the prison of the Fleet, because he had made a return of a writ contrary to what he had said in the same court the day before: and 11 H. 6. [which see pl. 2.] was vouched by Warburton J. that if the sheriff returns that one is *languidus in prisiona*, whereas in truth he is not *languidus*, the sheriff shall be sued for his false return; which was agreed by the whole Court: quod nota. Godb. 219. pl. 317. Mich. 11 Jac. in C. B. Smith's case.

13. After judgment in action of the case by default, the sheriff was commanded by the writ of inquiry, diligently to inquire by the oath of 12 good and lawful men *de balliva sua quæ damna, &c.* who returned, that *mandavi J. G. ballivo libertatis R. H. mil' hundredi de B. cui executio præd' brevis totaliter restat facienda, & quod alibi infra com' præd' per se fieri non potuit, qui quidem ballivus sic mihi respondit, &c.* It was agreed by all the justices in the Exchequer Chamber, that the return was insufficient, it being apparently untrue, and against law; because the writ was directed to the sheriff himself to execute in any part of the shire, and there is *no venue laid in this enquest of office*, as there is in other writs, which intitles bailiffs of franchises; but yet the Court [212] would not reverse the judgment, there being divers of the like both in B. R. and C. B. Hob. 83. pl. 109. Trin. 12 Jac. Virely v. Gunstone.

14. In an action upon the case for a false return made to a *mandamus*, the return was set out to be made, *modo & forma sequenti, &c.* And after verdict for the plaintiff, it was moved in arrest of judgment, that this was *not certainly enough shewn to be the very return* that the defendant had made, and therefore that the declaration was ill, sed non allocatur; for per Cur. it is well enough. And judgment for the plaintiff. Ld. Raym. Rep. 496. Trin. 11 W. 3. Pullen v. Palmer.

(R) Not bringing in the Body, &c. according to the Return. Inforced how; and the Punishment thereof.

1. **T**HE sheriff returned upon *capias*, quod cepit corpus, and at the day had not the prisoner, but one answered for him by writ of the Chancery, and therefore the sheriff was amerced to 40s. and commanded to have the body at another day, and he failed, and was amerced in 100 shillings, charging him to have the body before them the next day, upon pain of 100l. and writ issued to the sheriff of Suffex; because he was supposed in Guildford gaol, and the sheriff returned, that in bringing his body to Green J. he was rescued in London, and imprisoned there, by which writ issued to the sheriff of London to take his body, and so he did. Br. Return de Briefs, pl. 71. cites 28 Aff. 47.

2. In *replevin*, the sheriff returned the *capias*, quod *mandavit ballivo qui mihi respondit quod haberet corpus ejus hic ad hunc diem,* Where the sheriff returned upon
and

capias, quod mandavit ballivo, &c. and the body did not come, by which *non omittas* was awarded, and *not distringas ballivum ad habendum corpus*, by return of the sheriff. Br. Return de Briefs, pl. 44. cites 38 E. 3.

who answered, that *cepit corpus, &c.* and the prisoner did not come, the sheriff was amerced, and *distringas ballivum* to have the body at another day was awarded. Br. Process, pl. 25. cites 47 E. 3. 28. — Br. Return de Briefs, pl. 24. cites 47 E. 3. 25. S. C. — S. P. And the sheriff returned *nihil*, and the opinion was, that *processus shall issue to the pluries*; quære of the exigent, and otherwise it is of another bailiff than bailiff of the king. Br. Return de Briefs, pl. 96. cites 5 E. 4. 4. — Ibid. pl. 92. cites 5 E. 4. 6. S. C. says, that if he returned *nihil*, *capias infinite* shall issue, but no exigent. — Br. Exigent, pl. 46. cites S. C. For exigent did not lie in this case at the common law, and the statute does not give it. — Jenk. 123. pl. 48. cites 5 E. 4. 5. S. C.

Where the bailiff returns *quod cepit corpus*, and has him not at the day, *non omittas shall issue*, and he shall lose the franchise for the time [viz. during the plea.] Br. Return de Briefs, pl. 89. cites 9 H. 7. 27.

So in trespass, at the capias the sheriff returned, *quod cepi corpus*, and had not the body at the day, by which he was amerced to 100s. for the escape; *quod nota*; and the party was indicted of the felony. Br. Return de Briefs, pl. 79. cites 40 Ass. 43.

and had not the body at the day, by which he was amerced. Br. Return de Briefs, pl. 19. cites 44 E. 3. 2. — S. P. And the plaintiff shall have disceit by original, or shall sue against him in the Exchequer upon his account. Br. Return de Briefs, pl. 31. — Br. Process, pl. 31. cites 7 H. 4. 31. S. C.

Upon such return, and not having the body upon a ca. sa. the sheriff was amerced, and it was said, that the plaintiff might have action against the sheriff, and this seems to be upon the escape; for his return shall conclude him; quære. Br. Return de Briefs, pl. 107. cites 7 H. 4. 21.

If upon such return of a capias the sheriff has not the defendant at the day, but protection is cast for him; the sheriff shall be amerced for his false return. Br. Return de Briefs, pl. 37. cites 11 H. 4. 57.

[213] 4. The sheriff returned in trespass against baron and feme upon exigent, *quod cepit illos*, and at the day the baron came in ward, and the feme not; by which the sheriff was charged of the body of the feme, and was amerced, and the writ issued to bring in the feme at such a day, &c. Br. Return de Briefs, pl. 18. cites 44 E. 3. 2.

Br. Process, pl. 31. cites 7 H. 4. 11. 26. S. C. 5. The sheriff returned *reddidit se* upon exigent, and had not the body; distress issued ad habendum corpus, and the sheriff was amerced. Br. Return de Briefs, pl. 31.

6. Where the sheriff returns *quod mandavit ballivo de D. qui respondit quod cepit corpus, &c.* and has not the body at the day, the bailiff is bound to bring in the body, and not the sheriff; per Hill; but per Hank, he ought to deliver him to the sheriff, and he to bring him in as officer immediate; as upon *scire facias*, the sheriff commands the bailiff who levies the money, he shall deliver it to the sheriff, so that the sheriff may have it at the day; contra Thirn. and agreed with Hill. Br. Return de Briefs, pl. 35. cites 11 H. 4. 43.

7. The sheriff returned *quod mandavi ballivo episcopi de E.* who returned *quod cepit corpus, &c.* and had him not at the day, &c. by which *distringas ballivum* issued, and the sheriff returned *quod ballivus mortuus est*, and by some *distringas episcopum dominum libertatis* has been seen in such case, but at last *distringas ballivum successor of the first bailiff* issued; and if he returned that the defendant is not taken, he shall have capias, and process of outlawry,

lawry, and where the bailiff is returned nihil, capias ballivum shall issue. Br. Return de Briefs, pl. 99. cites 14 E. 4. 1.

8. 23 H. 6. cap. 10. Enacts, that if the sheriff returns a *cepi corpus*, or *reddidit se*, he shall be chargeable to have the body of the party ready at that day of the return mentioned in the writ, as before this act.

In case, the plaintiff declared against the sheriff of Middlesex

setting forth the clause in the 23 H. 6. cap. 19. by which it is enacted, inter alia, that if a sheriff return *cepi corpus*, or *reddidit se*, he shall be chargeable to have the body at the day of the return of the said writ, &c. and also sets forth, that M. D. owed him 240l. on bond, and that to recover the same, he sued out a bill of Middlesex, returnable tres Mich. by virtue whereof, and before the return, the defendants arrested the said M. D. and had him in their custody, and let him to bail upon security, &c. given them for his appearance at the return of the writ, *ubi revera the bail were not reasonable sureties, nor had sufficient estates within the said county, nor found any bail to answer the action*, by reason whereof the plaintiff had lost his debt, &c. The defendants pleaded and set forth the whole statute, and shewed, that the bill of Middlesex was sued forth, and delivered to them, and the arrest, and that they had M. D. in their custody; and that they discharged him upon security given for his appearance by the bail, they having sufficient estates within the county at that time, whereupon they returned *cepi corpus*, &c. Resolved that the action did not lie against the sheriff, because he is compellable by the statute to discharge the prisoner upon reasonable bail, and if he return a *cepi corpus*, and have not the body at the return, he shall be amerced to the king; and adjudged for the defendant, per tot. Cur. 2 Saund. 59. Hill. 21 & 22 Car. 2. B. R. *Posterne v. Hanson & al.*—Mod. 33. pl. 80. Anon. seems to be S. C. and there it is said by Keeling and Twisden, that notwithstanding the 23 H. 6. which obliges the sheriff to take bail, yet he can make no other return than either *cepi corpus* or *non est inventus*; for at common law he could return nothing else, and the statute, though it compels him to take bail does not alter the return. And they said, that it had been so adjudged here, in the case of *Franklin v. Andrews.*—But 2 L. P. R. tit. Return of Writs, 12, that the sheriff in such case ought not to return a *non est inventus*, but a *cepi corpus*; and if he does return a *non est inventus*, the plaintiff may bring an action upon the case against him for making a false return; but upon the *cepi corpus* the Court will increase the amercement upon the sheriff, until he makes the party appear. Cites Hill. 22 Car. B. R.

9. *Recordare to remove a record out of ancient domesne, the sheriff returned, that the suitors refused to deliver him the record*, by which the distress was awarded against the suitors to have the record such a day. Br. Return de Briefs, pl. 82. cites 1 H. 7. 30. [214]*

10. The sheriff arrested J. S. at the suit of A. and let him at large upon bail, pursuant to the statute 23 H. 6. and afterwards returned that J. S. was *languidus in prisona*; this was held no false return, of which the plaintiff could take advantage by action against the sheriff; for it is only for the sheriff's excuse in not having the body, and he is only finable by the Court, if he brings not in the body. Cro. 852. pl. 8. Mich. 43 & 44 Eliz. B. R. *Boles v. Lassels.*

Noy. 89. S. C. accordingly; but cites Hill. 44 Eliz. B. R. *Spencer's case*, where in an action of the case after a *cepi*

returned, and at the habeas corpus the sheriff returned *languidus*, where in truth the party was at large without bail, judgment was given for the plaintiff; but otherwise if the sheriff had let him out upon bail.—So where the return was *cepi corpus & paratum habeo*, but he had not the body at the day, and an action was brought against the sheriff for a false return, and in support of this action was cited the case of *Bowles v. Lassels*, which North Ch. J. Windham, and Atkins J. said was a strong case to govern the point; and that the return of *paratum habeo* is in effect no more than that he had the body ready to bring into court when the Court should command him; and it is the common practice only to amerce the sheriff till he does bring in the body; and therefore no action lies against him; for it is not reasonable that he should be twice punished for one offence, and that against the Court only. Scroggs delivered no opinion; but judgment was given ut supra. 1 Mod. 239. &c. pl. 4. Pasch. 29 Car. 2. C. B. *Page v. Tulse.*—2 Mod. 83. S. C. accordingly; but Scroggs J. was of another opinion, and said that this action being brought because the defendant said he had the body ready, when in truth he had not, was an apparent injury to the plaintiff, of whom the statute must have some consideration; for it does not require the sheriff to say *cepi corpus & paratum habeo*, but he must make his return good, or otherwise these words are very insignificant; and if the statute obliges him to let the party to bail, and nothing more is thereby intended for the benefit of the plaintiff, why does the Court amerce the sheriff, and punish him for doing what the statute directs; therefore if the plaintiff brings a

habeas

habeas corpus upon the cepi, and the defendant does not appear the plaintiff is then well entitled to this action.—S. C. Freem. Rep. 209. pl. 215. adjournatur.—Ibid. 225. pl. 233. S. C. adjudged accordingly by all except Scroggs J. who said, that because it had been lately adjudged here between ELLIS AND YARBOROUGH, that an action would not lie against a sheriff for taking insufficient bail, therefore he thought it ought to lie, if the sheriff did not bring in the body, or else the party should be without remedy.

Raym. 171. S. C. That a venditioni exponas issued to him, which he neither returned, nor made satisfaction for. And an attachment being moved for against him, it was prayed to stay it, because the

fieri facias issued out of B. R. to the sheriff of the county palatine of Chester, which it was urged could not be, and took a difference between a judgment originally given in this court, and a judgment removed hither by writ of error, that in the last case it lies, but not in the first, and cited 21 H. 7. 33. pl. 32. That judgment in Calais or Wales cannot be here reformed, because not parcel of the realm, otherwise of Lancaster. Sed non allocatur, and an attachment was granted.

11. Upon a fieri facias the sheriff seized several goods, and returned *fieri feci ad valentiam*. The return was filed, and he not bringing the money into court, a tipstaff was sent for him; whereupon he appeared, and prayed to amend his return; because some of the goods, being mercery-ware, were impaired by lying, and he could not get buyers. The Court held, 1st, That such *return cannot be altered after it is filed*. 2dly, That upon such return the sheriff shall not be excused from payment; because he might have returned that he had seized the goods, which remain in his hands *pro defectu emptorum*; and so may be excused, if the goods are bona peritura, and actually perish. The sheriff was ordered to pay the money, and to answer interrogatories for his contempt. Sid. 407. pl. 18. Hill. 20 & 21 Car. 2. B. R. Needham v. Bennet.

12. See the statute of 4 and 5 Annæ cap. 16. S. 20. compelling the sheriff to assign bail bonds, &c. at Tit. Bail.

(S) What Writs must be returned.

1. THE writ of *retorno habendo* is not returnable. See Replevin (N) pl. 1.

2. No original writ of *prohibition* which issues out of the Chancery, is returnable either in the B. R. or C. B. but is directed to the judge or party, and is not returnable at all; but it appears in the Register that if the prohibition be contemned, then the Chancellor may award an *attachment for contempt of it* returnable either in B. R. or C. B. But an attachment in such case is but as a judicial writ. And there was great reason that no original writ of prohibition shall be returnable; for the common law was a prohibition of itself, and he who incroached upon the jurisdiction thereof incurred a contempt. 12 Rep. 59. Mich. 6 Jac. in Langdale's case.

[215]
1 Salk. 409.
S. C. accordingly.—
Ld. Raym.
Rep. 632.
S. C. accordingly.

3. In all *capias's ad respondend'* or other *mean process* to sheriff, if trespass or false imprisonment be brought against him for executing them, he cannot justify without *shewing a return*; and the *diversity* is between the *immediate officer of a court* to whom the writ or mandate is directed, and *one that acts under him*; for if he be no officer of the court but acts under him he may justify without shewing a return; otherwise, of sheriff, or other immediate officer;

officer; for he that has not shewed to the Court that he has done his duty in what the process of the Court required him shall not be justified by the process. Vide 38 H. 6. Per tot. Cur. 12 Mod. 396. Pasch. 12 W. 3. in the case of Freeman v. Bluet.

4. The first *replevin* and *alias* indeed are not returnable, but *are warrants to the sheriff to replevy*, and in nature of a *justicies*, and therefore one may justify by virtue of them without a return; but the *pluries* is returnable, and therefore, if the sheriff will justify by it, he ought to return it; otherwise one should have no means to have his goods again; and all the cases that seem against this are of *inferior officers*: and in case of original replevin to sheriffs, which is not returnable, but a *justicies*, the sheriff's *precept to his bailiff to summon in the defendant* is returnable, and gives them day in court. Per Cur. 12 Mod. 397. in the case of Freeman v. Bluet.

1 Salk. 409. pl. 5. S. C. accordingly.—Ld. Raym. 699. S. C. accordingly.

(T) Return of Writs, &c. *At what Time.*

1. **I**N *præcipe quod reddat* at the grand cape the *sheriff* returned the summons lacking 4 days of 15 before the return; and per Cur. it ought to be served 15 before the first day of the return of the writ; for 15 days before the 4th day will not serve, quod nota, and so it is in *ley-gager* of nonsummons. Br. Process, pl. 78. cites 4 H. 6. 28, 29.

2. At the day that the *venire facias* was returned the defendant was *essoigned*, which was adjourned to 15 Pasch. and *habeas corpore* was the same day returned 15th Pasch. accordingly, for otherwise the process shall be discontinued, and the same appears often that the process shall be returned the day of the adjournment of the *essoign*. Br. Process, pl. 120. cites 21 E. 4. 20.

3. A *capias utlagatum* was awarded the 25th of Eliz. and made returnable 35th of Eliz. which was argued to be merely void; for that every *capias* ought to be returnable the ensuing term, by reason of the mischief which might otherwise befall the prisoner to be kept always in prison and cited 21 H. 7. 16. 8 E. 4. 4. D. 175. And all the other justices but Fenner held clearly that the imprisonment by such *capias* was no lawful imprisonment. Cro. E. 467. pl. 17. Hill. 38 Eliz. B. R. in the case of Nector and Sharp v. Gennet.

S. C. was cited 2 Ld. Raym. Rep. 775. Trin. 1 Anne in case of SHERLEY v. WRIGHT in which case a *capias ad satisfaciendum* was made teste

in Michaelmas term, and made returnable in Easter term following, so that all Hillary term intervened, and for that reason it was insisted that the writ was wholly void. Holt Ch. J. held, that the case of NECTOR AND SHARP V. GENNET was a case in point; but he said, he was not satisfied with the reason of the said case; for there is an apparent difference between writs of *mesne process*, and writs of *execution*; for in case of writs of *mesne process* if a term be omitted between the teste and return, the cause is altogether out of court; but that is to be understood in *personal actions*; for in *real actions* the law is otherwise, for in them there must be nine returns between the teste and the return. But in case of a writ of *execution* the cause is come to its end. In cases of *mesne process* it would be hard to suffer so long a return, because the body must lie in prison, without having an opportunity to make a defence, when perhaps he is able to make a good defence. But the defendant ought to lie in execution, and the sheriff ought to have his body always ready to bring to the Court, when he shall be commanded by *habeas corpus*, &c. And therefore all the judges, viz. Holt Ch. J. Powis and Gould justices held, that this writ could never be void; and therefore they gave judgment for the plaintiff, nisi, &c.

4. A writ of error must be of a common return; if on a day certain, it is naught; where the writ of error is *ubicunque*, the scire facias ought to be on a common day. 12 Mod. 5. Pasch. 3 W. & M. Anon.

7 Mod. 12.
S. C. that a
bill of
Middlesex
is never re-

5. A bill of Middlesex cannot be made returnable *the same day whereupon it is tested*. 2 Salk. 421. pl. 6. Pasch. 1 Annæ. B. R. Green v. Rivett.

turnable immediately.—S. C. 2 Ld. Raym. Rep. 772. accordingly.

(U) Ill Return; aided by Appearance.

S. P. Br.
Retorn de
Briefs, pl.
48. cites
8 H. 6. 27.

1. **I**N *scire facias* the sheriff returned quod *scire feci per visum A. and B.* where it should be *per A. and B. and not per visum A. and B.* and exception taken, et non allocatur; because the defendant had appeared, and made attorney; quod nota. Br. Retorn de Briefs, pl. 21. cites 44 E. 3. 16.

And so by
him where
in *scire fa-*
cias to exe-
cute judg-
ment or fine,

2. If the sheriff at the *distringas juratores* omits the names of the manucapt. jur. and the jury appear and find for the plaintiff, this is well. Per Husley Ch. J. because they appear. Br. Retorn de Briefs, pl. 86. cites 3 H. 7. 8.

the name of the summoners are omitted, this is no error if the party appears and pleads. Br. Retorn de Briefs, pl. 86. cites 3 H. 7. 8.—So upon the grand cape if the name of the summoners and veiors are not returned, yet if the party appears and pleads this is no error. Ibid.

So if the
sheriff re-
turns issues

3. So if the sheriff does not return issues, if the jury be taken, this is no error. Br. Retorn de Briefs, pl. 86. cites 3 H. 7. 8.

upon 12, and not upon the rest, and the jury be taken this is no error; for the king is at no loss, and the taking of the manucaptors is to the use of the king; per Husley Ch. J. But Brooke makes a quære thereof; because it seems to him that it is error, if the return be not good, notwithstanding the appearance. Br. Retorn de Briefs, pl. 86. cites 3 H. 7. 8.

4. In *trespass* the issue was found for the plaintiff, and it was pleaded in arrest of judgment that upon the distress the sheriff returned manucapt. and not nomina plegior. manucapt. And the sheriff was examined, who said, that it was his intent that the process should be well served, by which all the justices of both benches except Brian it was amended, and the plaintiff recovered. Br. Retorn de Briefs, pl. 86. cites 3 H. 7. 16.

So upon ca-
pias or dis-
tress against
the party.

Per Husley
Ch. J. quod

5. And per Husley Ch. J. if the sheriff had returned no writ of distress, and the jury appeared, they should have been sworn; for they have day by the roll; for no party is in damage. Br. Retorn de Briefs, pl. 86. cites 3 H. 7. 8.

Townsend concessit, otherwise it is upon default; but Fairfax, Brian, and Sulliard e contra. Br. Retorn de Briefs, pl. 86. cites 3 H. 7. 16.

6. In debt on escape, and judgment thereupon, it was assigned for error, that the original writ had not the sheriff's name to the return according to the statute 12 E. 2. cap. 5. but the defendant appeared, and the plaintiff declared against him upon the record of the recovery, and the defendant had pleaded, nul tiel record. It

was

was held not material, though the writ had not been returned; for after appearance and pleading no advantage shall be taken of such a misprision, nor mis-awarding of mesne process: wherefore the judgment was affirmed. Cro. Eliz. 767. pl. 6. Trin. 42 Eliz. B. R. Dalton v. Thorp.

For more of Return in general, see Actions, Bail, Error, Sheriff, and other proper Titles.

* Reversion.

(A) Reversion. Possibility

[1.] IF it be found in a special verdict, that a *copyholder for life surrendered* into the hands of the lord *to the use of J. S.* as after follows, and that the *lord granted it afterwards to J. S.* to have to him *for his life*, and J. S. after [was] admitted accordingly, and after *died*. In this case, this shall *not revert to the first copyholder for life*, but the lord shall have it; for the copyholder has dismissed himself thereof by his surrender utterly, and when he surrendered to the use of J. S. *the law says, that it shall be for the life of J. S.* and the grant of the lord is accordingly; and so none can have it but the lord. Mich. 7 Car. in the Exchequer-Chamber, adjudged in writ of error, and the judgment in B. R. which was given accordingly per Curiam, upon argument at the bar, now affirmed per Curiam; præter Hutton, who seemed e contra; and Vernon, who doubted of it. And this was between † King and Loder.]

B. R. adjudged, it being in the case of a surrender of a bare tenant for life; but if a copyholder in fee surrenders to the use of another for life, who is admitted, he is in quasi by the copyholder, and by his death the copyholder shall have it again; and says, the judgment in B. R. was afterwards affirmed by all the justices of C. B. and barons of the Exchequer.——S. C. cited by North Ch. J. Mod. 200. pl. 31. in the case of BIRD v. KIRK; and said, that what is said in the case of KING v. LORD is to be understood of copyholders in such manors where the custom warrants only customary estates for life, and is not applicable to copyholds granted for life with a remainder in fee.

[2. If a man *seised of land in fee leases it for years, he has not any reversion*, nor can grant it by name of reversion till the lessee enters, or lessor waives the possession. Co. Litt. 46. b.]

[217]
* The word reversion has a several significations; the one is an estate left, which continues during the particular estate in being; the other is the returning of the land after the particular estate is ended, which last is the natural sense. Plow. Com. 160. b.——† Jo. 229. pl. 3. Mich. 6 Car. B. R. S. C. adjudged.—King v. Lord, S. C. Cro. C. 204. pl. 10. in

(B) What

See (D)

(B) *What is a Reversion.*

1. **A REVERSION** is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of the estate which was granted. Co. Litt. 22.

2. Where a man leased to 2 and to the heirs of one, and they leased for term of life, and the lessee died, they shall have the land jointly as they had before; for there *he who had the fee had no reversion.* Br. Entre Cong. pl. 100. cites 13 E. 4. 4.

*[215]

A. seised in fee leases to B. for years, A. has no reversion, nor can grant by name of a reversion

3. Debt lies not on a lease for years *before entry* by lessee, or *waiver by lessor*; for till such time the lessor shall be adjudged occupier, in which case he shall have no rent. Arg. Pl. C. 423. a. b. in the case of * Bracebridge v. Cooke, —cites it as the Dean and Chapter of Canterbury's case. 18 H. 6. 1. a. 28 H. 8. 114. a.

till the lessee enters or lessor waives the possession. Co. Litt. 46. b. —Before entry of lessee there is no reversion. Lutw. 444. Smith v. Boughton.

Ibid. Marg. says, Bendlofe reports the case to be adjudged according to the opinion of Harper, and that after judgment was given that the plaintiff should be

4. The lord of a rectory, which was a manor, demised 10 acres of the demesnes for 10 years to A. and afterwards leased the whole manor to B. *per Nomen* of his manor of, &c. for 20 years from Michaelmas then next following, but A. never attorned to B. Manwood, Dyer, and Wray, thought that an interest of 10 years passed to the lessee of 20 years in the 10 acres after the first 10 years are ended, and that it passed not as a reversion but as parcel of the manor; for the 10 acres were never severed from it, but the franktenement and the fee thereof remained always parcel and member. But Harper contra. D. 349. b. 350. pl. 18. Pasch. 18 Eliz.

barred, the justices said, that the reversion of the said tenements in the count passed by the said lease made to the said B. without any attornment; for they were parcel of the said rectory [or manor.] —Bendl. 289, 287. pl. 286. according to the marg. in D. cited above; and the Reporter says, he was of counsel with the plaintiff.

Cro. J. 604. pl. 32. S. C. accord. jingly.

5. A. seised in fee made a bargain and sale for 3 years; here is a reversion in vendor *before entry* of the vendee. Jo. 9. pl. 7. Mich. 18 Jac. in the Court of Wards. Mitton v. Lutwick.

6. Lessor disseises his tenant for life if the lessor grants the reversion the grant is void; for there is no reversion. Hob. 323. in the case of Elvis v. the Archbishop of York.

And so it is in case of a disseisin of the tenant for life by the reversioner; for

7. If lessor ejects his lessee, and dies, the possession descends to the heir of one joint estate, and yet the right remains still in the lessee, and if the lessor grants the reversion the grant is void; for there is no reversion. Hob. 323. in the case of Elvis v. the Archbishop of York & al.

such disseisin by necessity of law makes a quasi fee; because wrong is unlimited and ravens all that can be gotten, and is not governed by terms of the estates, because it is not contained within rule. Ibid.

8. *Tenant in tail and reversioner in fee join in a lease for life, and livery is made by the attorney of both; during the lease for life this is a discontinuance, and the tenant in tail has gained the reversion, so that a devise of the reversion by the reversioner in fee is void during the life of the grantee for life.* Jo. 358. Pasch. 9 Car. B. R. Baker v. Hacking.

Cro.C.387. 405. S.C. by 3 justices accordingly; but Crooke J. contra.— 'Tis the lease of the tenant in

tail only during his life. Roll. Abr. 633. pl. 4. S. C.—'Tis the lease of the tenant in tail only, and the confirmation of the reversioner in fee. Hutt. 127. S. C.

9. When a *statute is extended* it turns the estate of the conusor into a reversion. Per Ventris J. 2 Vent. 327. in the case of Dighton v. Greenvil,—cites Co. Lit. 250. b.

10. He that enters by virtue of a *power to hold till satisfied an arrear of rent*, leaves the whole estate in the owner of the land, and not a reversion only. Per Ventris J. 2 Vent. 327. in the case of Dighton v. Greenvil.

(C) What is a Reversion to which Rent is incident. [219]

1. **T**HE rent is incident to the reversion when it is *reserved generally*, and shall go to the heir in *borough english*, and to the heir *a parte materna*. Arg. Hard. 90. cites 7 H. 6. 4. 5 E. 2. Avowry, 207.

S. P. Ibid. 91.—S. P. Per Nicholas J. Ibid. 94.

2. Two things are *requisite* to make a rent incident to a reversion, viz. *Privity* and the *same right of estate*. Arg. Skin. 62. in the case of Paulin v. Hardy.

3. *As if there are 2 jointenants, and one makes a lease for years, rendering rent, and dies, the survivor has the franktenement, but shall not have the rent; because he comes in paramount the lease.* Arg. Mo. 139. pl. 281. in Shelley's case,—cites 2 Eliz. Dyer. D. 187. pl. 5. Mich. 2 & 3 Eliz. Anon. The Court inclined, that the lessee should hold the term discharged of the rent; but the Reporter adds, *quare bene*.—1 Rep. 96. Arg. S. P. in Shelley's case.—Co. Litt. 185. a. accordingly; because the *survivor is in by the first feoffor*, which is paramount to the rent.—S. P. Arg. Skin. 62. in the case of PAULIN v. HARDY, the survivor shall not have the rent for *want of privity*.—3 Bulst. 330. S. P. by Doderidge J. So if they join in a lease for years, rendering rent to one of them, it is good; and the other shall not have it, nor shall it go with the reversion.

4. If a *lease be made for life, rendering rent, and the lessee for life leases for years, rendering rent, and after lessee for life surrenders to him in reversion in fee, he shall not have the rent of the lessee for years, nor waste; because the tenant for life, who surrendered, could not punish the waste in this case.* So if the tenant for life purchase reversion in fee, he shall not have waste during his own life. Mo. 94. pl. 232. Pasch. 12 Eliz. the Ld. Treasurer v. Barton.

* Arg. Bridgm. 44. For he is in by his reversion, which is above the lease for years.

5. But otherwise of a *lease for years, rendering rent, and the lessor after grants reversion for life or years, and he in reversion surrenders to him, he shall have the rent or waste; because it was once a rent incident to the reversion, and so it was not in the case above; per Popham.* But Plowden and Ipsley say, that all is one as to the action of waste. Mo. 94. Ld. Treasurer v. Barton.

6. A.

3 Le. 15.
pl. 35. S.C.
That an estate for life accrues to B. by way of confirmation, and the remainder to the stranger depending on the estate created by the confirmation.

6. A. by deed, reciting, that *B. holds a close of him at will, grants the same close to B. for his life, rendering rent, and by the same deed grants reversion to a stranger in fee*; this is a good confirmation for life to B. and good remainder to the stranger, but it is no grant of the reversion: so that it seems that the rent remains to A. during the life of B. And. 23. pl. 46. Mich. 13 & 14 Eliz.

7. Habend' and tenend' *reversionem* illam ad terminam vitæ, &c. *cum post mortem, &c. aut aliter acciderit*, rendering, &c. when the reversion shall happen as is aforesaid. The words (*cum reversio acciderit*) shall be construed, *cum possessio acciderit ad reversionem*, till when no rent is payable. D. 376. b. pl. 27. Trin. 23 Eliz. Anon.

8. A. granted land to C. after the death of B. for 4 years, and the grant was made by the name of a reversion; this is but a lease in reversion, and rent is not incident to it. Goldsb. 39. pl. 14. Per Cur. Mich. 29 Eliz. Anon.

2 Le. 33. in the case of Machil v. Danton.

9. A. devised land to B. for years, rendering rent to A. and his heirs, and afterwards A. devised the reversion to J. S. the rent shall go to J. S. as incident to the reversion. Per Anderson Ch. J. and Peryam seemed to agree to it. Goldsb. 75. pl. 3. Hill. 30 Eliz. in the case of Bettenham v. Harlackenden.

*[220]
He may dispose of the whole term. Co. Litt. S. 526, 300. —Poph. 125. S. C. but there it is reported as if no grant was made of the remaining 10 years; and Croke and Haughton J. agreed, that the rent should go to the executor or him who has the reversion under the lessor, and not to the wife; for she comes in paramount.

10. Baron possessed of a term in right of his wife for 20 years, leases for 10 years, and then grants over the reversion; it was agreed, * that the grantee shall not have the rent. But Montague Ch. J. said, that the wife in Chancery might be relieved for the rent. Godb. 279. pl. 396. Trin. 16 Jac. B. R. in the case of Blackston v. Heap.

(D) Grant of Reversion, good.

Jo. 9. pl. 7. S. C.—S. P. eld Cro. C. 110. pl. 2. Pasch. 4 Car. C. B. in the case of Isham v. Morrice.—Het. 89. S. C. by the name of Norris v. Isham.—But if one demises land for years, and grants, the reversion before entry of the lessee the grant is void, as it is in Saffin's case. 6 Rep. 12. 46. Ibid.—S. P. For he has no reversion. Cro. E. 585. in the case of Buckler v. Hardy.

1. **A. BARGAINS** and sells for years to B. lands in A's own possession, afterwards A. reciting this lease, makes a grant to C. of the reversion expectant upon it to diverse uses. B. never entered. This is a good conveyance of the reversion, and the estate is executed and vested in B. by the statute, and is divided from the reversion, and not like a lease for years at common law; for in that case there is not any apparent lessee till entry, but here by operation of the statute it absolutely and actually vests the estate in B. as to the use, but not to have trespass till actual entry and possession. Cro. J. 604. Mich. 18 Jac. in the Court of Wards, Lutwich v. Mitton.

2. In the grant of a reversion the *lease is misrecited* as to its commencement, yet the grant was held good. Hob. 128. *Withes v. Cafon.* S. P. Cro. C. 897. In the case of *Miller v. Manwaring.*

3. A copyholder in fee by licence makes a *lease in May to commence at Michaelmas next*; the lessee enters and was possess'd, and afterwards in *June* the copyholder *surrenders the reversion* to divers uses. Resolved, that the grant is not good, the entry and surrender being pleaded *before the commencement of the lease*; but had the grant been alleged generally, without naming any time, perhaps it had been good; but as the plea is here it is no reversion. Litt. R. 17. *Selby v. Becke.* Cro. E. 585. 5 Rep. 129. b. in *Saffin's* case.

(E) Grant of Reversion. Good; in Respect of the Estate of the Grantor.

1. **I**F a man *leases to baron and feme for their lives*, and after he *grants the reversion of the land which the feme held for term of her life to a stranger*, the grant is not good; for he had no such reversion. Br. Grants, pl. 137. cites 13 E. 3. & Fitzh. tit. Grants, 63. Br. Joistnants, pl. 163. cites S. C.—S. C. cited Trin. 22 Jac. C. B. Winch. 96.—2 Rep. 67. b. S. C. cited par Cur. Hill. 43 Eliz. B. R. in *Tooker's* case.—Cro. E. 803. pl. 1. in the case of *Rudd v. Tucker*,—cites 13 E. 3.—S. C. cited Arg. Goldsb. 26. pl. 27.

2. So where a man *leases to 2 men for life*, and after *grants the reversion of one*, this is not good. Per Cur. Br. Grants, pl. 137. cites 13 E. 3. & Fitzh. tit. Grants, 63. Left. Stat. of Limit. 30.

3. In assise the tenant pleaded in bar a grant of the reversion by the tenant in tail, father of the plaintiff, whose heir, &c. with warranty, and because the grantor died before the tenant for life so that it was no discontinuance, therefore no bar. Br. Assise, pl. 342. cites 36 Aff. 8. [221]

4. If a reversion descends to a feme covert, and the baron grants reversion to J. N. and the tenant for life attorns, and after the baron dies living the feme and the tenant for life, the grant is void; because it was not executed in the life of the baron, and he had nothing but in the right of his wife. Br. Grants, pl. 97. cites 10 E. 4. 8. Br. Tra verse, per &c. pl. 222. cites S. C.

5. The issue after the death of his father, tenant by the curtesy, before entry recites a *lease made by his father*, and that the reversion was in him, and grants reversion of the said land to another for years after the expiration of the said first lease, this is a void lease; for he has no reversion at this time the first lease being determined. Jo. 355. Hill 10 Car. B. R. *Miller v. Manwaring.* Cro. C. 899. S. C.

(F) *Devested, by what, and by what revested.*

1. **I** F I lease land for term of life the remainder to A. for life, and A. disseises the tenant for life, my reversion is out of me; but if the tenant for life dies, the estate of A. is changed, and he is now in by his remainder, and my reversion is revested in me. Br. Estates, pl. 17. cites 19 H. 6. 22. Per Fortescue.

See Appen-
dant, (B)
pl. 28.—
See Devise.

(G) *Passes. By what Words a Reversion passes. And what passes by the Word Reversion.*

1. **I** F a man has reversion of a common in fee, of which E. is tenant for life, and he grants the common in the life of E. by the words *all that his common, &c.* the grant is void, because he has only reversion. Br. Grants, pl. 177. cites 37 Aff. 14.

* It was re-
solved that
by the
grant of a
manor
without
words of
the rever-
sion, the re-

2. If a man leases his manor or house for life, and after gives or grants *all his* * manor or messuage, this is not good, for it is the reversion of the lessor, and the house or manor of the lessee during his life, and attornment shall not aid where the grant is void, but if he had granted *his interest* in the manor or house, this had been good. Per Whorwood. Br. Grants, pl. 150. cites 35 H. 8.

reversion shall pass; for this word manor includes all estates and degrees of estates of or in the manor. 6 Rep. 56. Trin. 4 Jac. in Lord Chandos's case.

So if the
words of
the grant
be * *totam*
terram
which the
feme holds

3. If a feme be endowed of a 3d part, and the heir grants *the 2 other parts together with the 3d part*, which the feme holds *cum acciderit*; by such grant the reversion of the third part shall pass. Arg. Pl. C. 159. in the case of Throgmorton v. Tracy, cites 10 E. 2.

in dower, the reversion passes. Per Fenner. 4 Le. 79. cites 38 E. 3. — * S. P. Br. Grants, pl. 30. cites 38 E. 3. 26. per Belk. — But if he had granted the reversion nothing but the 3d part would pass. Litt. R. 18. in the case of Selby v. Beckes, cites 6 Rep. 36. 5 Rep. 124. Baffin's case.

4. By grant of a reversion habend' *the farm* the reversion will pass. Pl. C. 196. &c. Wrotlesley v. Adams.

5. By the grant of *all tenements* a reversion will pass. Per Dyer. Mo. 36. pl. 118. Trin. 4 Eliz. in an Anon. case.

[222]

6. A. leased a house and land to B. for years if B. so long live. Afterwards A. by indenture granted the house and land to J. S. to hold the reversion to J. S. for life, *cum per Mortem, &c. acciderit, reddend.* to A. and his heirs, *cum reversio predicta acciderit* 9s. a year. Resolved, that by the demise of the messuage and land for life the reversion shall pass, but by grant of the reversion land in possession will not pass. 10 Rep. 107. a. b. in Lofield's case, cites Hill. 23 Eliz. C. B. Palmer v. Prowse.

7. If

7. If a man bargains and sells his reversion of tenant for life by words of *bargain and sale only*, and the deed is *not inrolled* within 6 months, but afterwards the tenant for life attorns, yet the reversion shall not pass, because bargain and sale are not apt words to make a grant; per Dyer Ch. J. and the other justices. And Dyer said, it had been so adjudged in the C. B. Godb. 7. pl. 9. Pasch. 23 Eliz. in C. B. Anon.

But where A. was tenant for life the reversion to B. who by indenture conveyed the reversion to A.

by the words *bargain, sell, and alien*, with attornment, the reversion will pass because of the word *alien*. Cro. J. 210. pl. 1. Mich. 6 Jac. B. R. Adams v. Steer.——S. P. Per Cur. D. 362. b. pl. 20. Marg. cites M. 6 Jac. B. R. Sir Edward Dawcy v. Newdigate.——But not by the words *bargain and sell only* without attornment. Cro. J. 210. pl. 1. cites it as adjudged in the Court of Wards. 30 Eliz. Per 2 Ch. Justices as the case of Menton v. Fettyplace.

8. *Trees growing excepted on a lease for life shall pass by grant of the reversion; for they are annexed to it.* 11 Rep. 50. b. Mich. 12 Jac. in Liford's case.

9. *All his lands.* Mo. 341. pl. 463. Hill. 35 Eliz. C. B. Pl. C. 161. b. Throgmorton v. Wallie.

Tracy.——433. b. Arg.——D. 124. pl. 40. S. C.——If *land is leased for life or years*, there the words *grant of the land* are words sufficient *ex vi termini* to make the reversion to pass. 4 Rep. 36. Mich. 26 & 27 Eliz. B. R. in Bozoun's case.

10. By name of a reversion in a fine *remainder will pass.* S. P. Pl. C. Cro. E. 594. pl. 37. Mich. 39 & 40 Eliz. C. B. Edwards 154. in the case of v. Peel.

morton v. Tracy.——S. P. Pl. C. 157. b.——S. P. Per Fenner. 4 Le. 76.——S. P. Roll. Rep. 319.——Pl. C. 141. b. Arg. S. P. in the case of Browning v. Beston; but where he has a reversion of some lands and remainders of others, the grant of all his reversions will not pass the remainders. Pl. C. 142.

11. By the words *all his interest*, the rent divided from the reversion will pass, and the reversion clearly passes by *all his estate.* Cro. E. 640. pl. 5. S. C. Mo. 526. pl. 694. Hill. 40 Eliz. Davy v. Matthews. —By grant of totum interesse

sum, as well reversions as possessions in fee simple shall pass. Co. Litt. 345.

12. By the name of *remainder* a reversion will pass in a fine. 2 And. 131. pl. 67. Mich. 41 and 42 Eliz. Anon.

13. If A. *leases for life to B.* and after *grants the reversion to C. habendum to C. in fee after the death of B.* this is void; for it is as much as if he had said *habendum the reversion*, which had not been good; per Haughton J. But Crooke and Doderidge held clearly *e contra*, because it is not said *habendum the reversion*, but only said *habendum*, and this may be intended the land, and then it had been clearly good; but if it be intended the reversion, yet it is good, because the estate passes immediately to be in possession by the death of the lessee; and Doderidge said, that this had been adjudged 3 or four times in this court before now: but Haughton agreed, that if it had been *habendum the land, &c.* it had been good. Roll. Rep. 256. Mich. 13 Jac. B. R. Obiter in the case of Southcott v. Adams.

14. A. devised *the third of all his living to his wife for life; this extends to lands in reversion expectant of estate for life, as well*

well as to lands in possession, and is as much as if he had said *all his farm*. Cro. J. 649. pl. 18. Mich. 20 Jac. B. R. Rowland v. Doughty.

At the time
of the fine
the rever-
sion was ex-
pectant on
the first

§ 15. Where there is a *future term to commence after a term in esse*, a reversion, as a reversion cannot be granted *omnino by way of grant*, because the estate does not pass till attornment; but by *fine* it may. Skin. 387. Mich. 5 W. & M. B. R. Quarn v. Roe.

lease, notwithstanding the grant of the second lease; for that continued only an *interesse termini*, and did not alter the reversion which remained intirely expectant upon the first lease, as it was before; and judgment accordingly. 1 Salk. 90. pl. 1. Trin. 5 W. & M. in B. R. S. C. by name of Gwam and Ward v. Roe.

See Grant
(K. 2) pl. 4.

(H) Passes. By what Words. *In futuro*.

1. **A** FARM is in lease, the lessor grants another lease of the *reversion of the farm, habend. the farm after the end of the former lease*; this is not a grant of the reversion in possession, but of the land when it shall come into possession, by reverting after the end of the first lease. Pl. C. 197. b. 198. 1 Eliz. Wroteley v. Adams.

2. A. granted land to C. *after the death of B. for 4 years*, and the grant was made *by the name of a reversion*; this is but a lease in reversion; if it should be a grant of the reversion, it is void, because it is to begin after the death of another. Goldsb. 39. pl. 14. Per Cur. Mich. 29 Eliz. Anon.

Ibid. 585.
pl. 15 Mich.
29 & 40
Eliz. S. C.
affirmed in
error in
B. R. —
2 And. 29. S. C.

3. A. tenant for life makes *lease for 4 years to B. and afterwards grants the reversion to C. habend. tenementa prædicta, from Midsummer next, for life of A.* The tenant attorns, yet nothing passed, because limited to begin at a day to come. Cro. E. 450. pl. 18. Mich. 37 & 38 Eliz. Buckler v. Harvey.

Cro. E. 323.
S. C. —
S. C. cited
Parl. cases
206. in case
of Jermin
v. Orchard.
—So where

4. A. tenant for life, *reversion to B. — B. by deed grants to C. the reversion of the said land, habend. dictam reversionem cum post mortem of the tenant for life, without more, ad terminum vite ejus*; tenant attorns, this passes as a reversion, and the words *cum post mortem* are idle. Adjudged. And. 284. pl. 292. (bis) Hill. 34 Eliz. Dashper v. Milbourn.

A. made a lease for 3 lives, and after granted the reversion to another for his life, *to commence after the death of the 3 lives*, it was resolved that the words (to commence, &c.) were void, and the grant of the reversion good in præsentia. Mo. 881. pl. 1236. in case of Stewkley v. Butler, cited Hill. 34 Eliz. B. R. Anon.

He in reversion expectant on estate for life *grants the reversion by the premises of the deed to another, after death of the lessee*; this is void, because it is to commence at a day to come; and so it had been if it had been by an habendum. Per Coke. Roll. R. 261. pl. 31. Mich. 13 Jac. B. R. — That it is void, per 2 just. against 1. who distinguished between an * *habend. post mortem*, and *habend. from a future day*, that the first is a limitation as to the [time of] having the possession, and not as to the having the reversion; for that is in the grantee presently, but that the *ad* excludes the grantee from having the reversion till that time. Cro. E. 450. Buckler v. Harvey.

* By the grant of the messuage and *land habend. reversionem, &c. for life post mortem of the lessee, &c. the habend. is good*; for in judgment of law nothing but the reversion is granted in the premises. 19 Rep. b. 107. Lofeld's case. — Cro. E. 684. S. C.

5. A. made a lease for years to B. and afterwards A. confirmed the lease to B. and by the same deed, to which B. and C. were parties, granted to B. and C. all, &c. (prout in the lease) *habend' from and after the said term, &c. to C. for one month after the end, &c. of the said term and years in the said recited lease, &c. and after the said month fully determined to have, &c. the premises, to B. his heirs and assigns for ever, rendering 6l. 6s. 4d. per annum.* Adjudged that the grant is void, being to convey an inheritance in futuro; for the month is not to begin * till the term is expired, and it is a grant of *interesse termini*, and no grant of a reversion; and though the indenture granted other things than were in the lease, yet as it is an *interesse termini* of part, so it must be of the residue; for there cannot be *fraction of the estate*; and then being only an *interesse termini* in C. there cannot be a grant of a remainder or reversion, to commence in futuro. Cro. C. 546. Trin. 15 Car. B. R. Swift Subchantor, &c. of Litchfield v. Eyres, &c. Lessees of Peyto.

Jo. 435. pl. 2. S. C. by the name of the Vicars Choral of Litchfield v. Ayres & al. accordingly. — Mar. 31. pl. 66. S. C. by the name of Swift v. Heirs, says it was held accordingly by 3 justices, but Jones J. was of opinion that here is not any grant of a freehold to commence at a day to come.

[224]*

(I) Passes by what Conveyance.

1. LESSOR confirms the estate of lessee for years, remainder to J. S. J. S. shall not take this as a reversion, because he is not party to the deed. Pl. C. Arg. 25. b.

Doct. & Stud. 94.

2. Where lands are in lease, and the lessor makes a new demise of the land; this is sufficient to convey the reversion where there is a deed and attornment also. Pl. C. 421. b. 422. in case of Bracebridge v. Cooke.

Reversion in a term is not assignable without deed and attornment;

and therefore a grant thereof not being pleaded to be by deed, notwithstanding that it was by attornment, was held not good; and judgment accordingly. 3 Lev. 154. 155. Pasch. 26 Car. 2. Beely v. Purry.

3. Reversion expectant on an estate of freehold lies only in grant. Co. Litt. 332.

4. Lessee for life and lessor join in feoffment by deed, reversion passes without livery. D. 362. b. Marg. pl. 20. cites it as agreed Mich. 6 Jac. Anon.

5. A reversion cannot pass but by deed or fine. Cro. C. 143. in case of Long v. Nethercote.

(K) Reversioner and Tenant for Life. How they are severally interested, inter se.

A. SEISED in fee of copyhold lands, surrendered them to the use of B. on condition that C. should enjoy the same for life; A. died, C. entered, and committed waste on the lands and the timber. On a bill by B. to stay waste, it was decreed that no relief could be for waste done, it appearing that C.

Chan. Cases 271. Cornish v. New. S. C. but nothing appears there as to copy

hold, or the
point of
waste.

tenant for life had paid off 100l. mortgage on the premises; but an injunction against him to stay all future waste, and B. to pay two thirds of the 100l. and C. the other third. Fin. R. 220. Trin. 27 Car. 2. Cornish v. New.

[225]

2. Oliver Cromwell (the grandson of the protector) devised a term for 99 years to trustees for payment of debts and legacies, and subject thereunto devised to Richard Cromwell his father for life, remainder to his sisters the plaintiffs. The debts and legacies were paid by sale of timber and wood; yet a lease for 9 years certain was decreed to be made by the trustees to a tenant, of part of the capital messuage, at 170l. per ann. though the reversioners opposed it. 2 Vern. 647. pl. 576. Hill. 1709. Gibson v. Cromwell.

(L) *Reversioner. His Power. Charges by him good to bind the Heir.*

As if a man
leases his
land to
J. S. for
life, render-

1. **H**E in reversion may charge the land in the life of the tenant for life; and this shall take effect after the death of the tenant for life. Br. Rents, pl. 24. cites 34 Ass. 4.

ing 2s. per annum, and after grants to another 2s. out of the land which J. S. held of him for term of life to the grantee and his heirs during the life of the grantor; this shall be taken as a grant of a new rent by him in reversion, and that the grantee shall have the rent, though J. S. dies. Ibid.

2. If a man leases for life, and grants the reversion, or remainder over to J. N. who charges the land and dies, and the tenant for life is heir to him to the fee; he shall hold discharged; for he hath the possession by purchase though he hath the fee by descent, and yet the franktenement is extinguished in the fee. Quære. Br. Charge, pl. 16. cites 9 E. 4. 18.

(M) *Actions. What Actions Reversioner may have, and when.*

1. **I**F a man devises lands to one in tail, and the tenant in tail dies without issue, he in reversion shall have a writ of *ex gravi querela* in nature of a *formedon in the reverter*, to recontinue the possession of the land in him. E. N. B. 199. (A)

2. The grantee in reversion shall have writ of *ad terminum qui præterit* against the lessee or his heir or assignee, and yet there is no such writ in the register. F. N. B. 202. (B) cites 8 E. 2. Itin. Canc.

3. He in reversion shall have writ of *intrusion* against him who intrudes into the land after the death of tenant for life, or in dower; or by the curtesy. F. N. B. 203. (E)

4. Where tenant in dower aliens in fee, for life or in tail, he who has the reversion in fee, or in tail, or for life, shall have a writ of *entry in casu proviso* against the alienee, and against him who

who is tenant of the freehold during the life of the tenant in dower, &c. and the writ may be *in the per, cui, and post*. F. N. B. 205. (M)

5. If a man grants the reversion of lands which are held of his inheritance in dower, and the tenant attorns, and afterwards the tenant in dower aliens in fee, the grantee shall have a writ *de assignatione*. F. N. B. 206. (B)

6. If tenant for life, or for another's life, or by the curtesy aliens in fee, in tail or for life, he in reversion for life, in fee, or in tail shall have a writ of *entry in consimili casu*, during the life of tenant for life who aliened. F. N. B. 206. (F)

7. Where tenant in dower by the curtesy, or for life aliens in fee, or life of another, or in tail; after their death he in reversion in fee, or for life, shall have a writ of *entry ad communem legem*. [226] F. N. B. 207. (G)

8. A. leased for years to B.—B. covenanted to repair. A. granted the reversion to C.—B. died leaving his wife executrix. Per Cur. C. shall not recover damages—but only from the time of the grant, and not for any time before; yet the executrix shall be charged for non-repairing as well in her husband's time as in her own. 3 Le. 51. pl. 72. Trin. 15 Eliz. C. B. Anon.

9. Tenant in possession may have trespass, and the reversioner may have *case* for the same trespass, as for destruction of *timber trees*, in regard of their several interests. But the reversioner cannot have *trespass* during the term; for that is founded only upon the possession. 3 Lev. 209. Hill. 36 & 37 Car. 2. and 1 Jac. 2. C. B. Biddlesford v. Onslow.

(N) *Pleadings*. And where there must be a *Faita (M. 4)*
Profert or Monstrans of Deeds, in Cases of Re- *Privies.*
versions and Remainders.

1. **W**AST by him in remainder he ought to shew *deed of re-* *Ibid. pl. 15.*
mainder, and so he did, and variance is not material *cites 41 E. 3.*
there. Br. Monstrans, pl. 17. *cites 42 E. 3. 19.* *23. S. P. if*

the tenant; but by Finch. he need not shew it till it be demanded. *it be de-*
manded by

2. In assise, where he in remainder is in possession, so that the remainder be executed, he may plead the matter and convey himself to the remainder *without shewing deed of remainder*; because it is executed. Br. Monstrans, pl. 103. *cites 43 Ass. 24.*

3. *Contra* where he demands the land by ** formoden* in the re- ** Ibid. pl.*
mainder, or brings a writ of *waste*. Br. Monstrans, pl. 103. *cites 129. cites 22*
43 Ass. 24. *E. 4. 34.*

he in remainder may be received without shewing deed. *Contra that*

4. In replevin, *services were given to A. in tail*, the remainder to B. in fee, the tenant in tail is seised, and dies without issue, and he in remainder was seised of fealty, and distrained and avowed for the

the rent; and good per Cur. without shewing deed of remainder. Br. Monstrans, pl. 150. cites 45 E. 3. 28.

5. *He in remainder who gets a release of his companion in remainder* prayed to be received, and was received notwithstanding that the release was made *pending the writ*, but he shall not shew deed of remainder and the release too; quod nota. Br. Monstrans, pl. 30. cites 7 H. 4. 10.

6. *Præcipe quod reddat*; the tenant for life prayed *aid* of him in remainder. Per Thirning, you shall shew *deed of remainder*; for it belongs to you, by which he shewed deed. Br. Monstrans, pl. 39. cites 12 H. 4. 20. Brook makes a quære, if of necessity; for it is otherwise, 22 H. 6. 1. For a remainder may be by livery without deed. Br. Ibid.

7. *Quare impedit*; the plaintiff conveyed himself to the advowson by grant by fine to J. N. in fee, who after granted it to W. for life, and after by another deed granted the *reversion to the plaintiff*, and that W. is dead, and so made title to himself; and the plaintiff was compelled to shew the deed of grant of reversion, [227] for it belongs to him, but not the grant for life to W. And per Hank. he shall shew the fine also; and so he did. Br. Monstrans, pl. 40. cites 14 H. 4. 10, 11.

Br. Oyer de Faits, pl. 10. cites S. C. 8. He in remainder, who prays *aid* to be received, need not shew deed; for the deed of remainder belongs to the tenant for life; per Strange, quod non negatur. Br. Monstrans, pl. 49. cites 7 H. 6. 1.

9. *In assise*, the plaintiff intitled himself by remainder, he ought not to shew deed, and yet the remainder cannot commence without deed; per Fulthorp, which Yelverton agreed. Br. Monstrans, pl. 55. cites 21 H. 6. 23.

So upon a grant of reversion, which cannot commence without deed; but he in remainder nor he in reversion cannot have assise before the remainder and reversion be fallen to the possession, and this vetted and executed, and then they need not shew deed: contra after the execution of it. Per Yelverton. Br. Monstrans, pl. 55. cites 21 H. 6. 23.

10. If a man grants the *reversion* of his tenant for life by deed, and the tenant attorns and dies, and he in reversion, who purchased, enters; this is a good plea without shewing deed, for this is executed; and it appears by his pleading, that all commenced by title. Per Choke. Br. Monstrans, pl. 60. cites 15 E. 4. 16.

Pl. C. 57. S. P. Per Mountague Ch. J. agreed, because all passes at one time, and by one livery; but if it was by grant of reversion, there though he was once seised, yet it should be otherwise; for in the 20 L. b. All the difference is taken between remainder and reversion, placito ultimo ut supra. 57. b. 11. Lease for life, remainder in tail; tenant for life dies; remainder-man enters and dies; his issue shall have *formedon*, and declare on an immediate gift, and not shew the deed of it; but otherwise if it was to execute it. Per Hales J. Pl. C. 52. in case of Wimbish v. Talbois, cites 18 H. 8. 4. Br. Monstrans. 1.

For more of Reversion in general, see Devisse, Grant, Remainder, Rescise, and other proper Titles.

Reverter.

(A) In what Cases.

1. **F**EOFFMENT in fee, on condition that feoffee shall in-
feoff a stranger, if upon the tender of the feoffment the
stranger refuses, the feoffor shall have all the estate again. Arg.
2 Roll. R. 68. cites 19 H. 6. 34. 2 Ed. 4. 3.

2. If a rent be granted to one and his successors, and the *cor-
poration is dissolved*, the rent shall revert to the donor; and there
is no difference between things lying in prender or in render.
Per Coke and Warburton J. but Nichols J. contra, that the rent
extinguishes in the land itself. Godb. 211. pl. 301. Mich.
11 Jac. C. B. in the case of the Dean and Canons of Windsor
v. Webb.

3. On a *void limitation*, as of a remainder in possibility of a
chattel real to the heir of the person limiting, there the estate in
interest reverts to the limitor. Chan. Cases, 8. Hill. 13 & 14
Car. 2. in case of Goring v. Bickerstaff.

4. Devise was of a *term for years to several successively for life*; [228]
after the deaths of all, the residue shall revert to the executor;
there may be a possibility of reverter even where no remainder can
be limited, as in case of a gift to A. and his heirs while such a
tree stands. 1 Salk. 231. Hill. 9 W. 3. C. B. Eyres v.
Falkland.

For more of Reverter in general, see Condition, Estate, Uses,
and other proper Titles.

Revive.

(A) What Things shall revive.

1. **A** THING which is *once extinct* cannot revive. Br. Pre- *As where*
rogative, pl. 32. cites 24 E. 3. 65. *priority is*
determined
by purchase of the manor by the king, there if the king gives the manor to the subject in fee, yet
the priority shall not revive. Ibid.

2. So of *services*; as to find 3 chaplains to do service in A's chapel, if the *chapel falls*, then while the chapel is down the divine service ceases: but if *rebuilt in the same place* of the old one, the service is revived, but if *in another place*, the grantee is not bound to find chaplains to do service there. Arg. 4 Rep. 86. in Lutterel's case, cites 10 H. 7. 13. a. 16 H. 7. 9. a. b. the Abbot of Newark's case.

But if the lord converts it to other uses, as to a kitchen or stable, the

3. So if tenant holds *to cover the lord's hall*, if the hall falls or be pulled down, and *built larger or in another place*, the tenant is excused; but if rebuilt in the same place and of the same dimensions, the service is revived. Arg. 4 Rep. 86. b. in Lutterel's case, cites 10 E. 3. 23.

tenure is gone. Ibid.——S. C. cited Noy. 127. in case of Buck v. Amcotts, because thereby the tenant is put to greater charge, and no profit or benefit accrues to the tenant.——Win. 45. in case of Pope v. Reynolds, S. C. agreed. Arg.

Cro. E. 216. pl. 13. Hill. 33 Eliz. B. R. S. C. according-ly by name of Wickham Bishop of Lincoln v Cooper.

4. *Prescription for discharge of tithes*, being interrupted by their coming into lay-hands, shall be again revived by their coming into spiritual hands; for tithes are not issuing out of land. Le. 241. pl. 336. Mich. 33 Eliz. B. R. Bishop of Lincoln v. Cowper.

5. A *condition* cannot be discharged for a time, and in esse again afterwards. Per Gawdy, Clench and Popham. Cro. E. 816. Pasch. 43 Eliz. B. R. in case of Dumper v. Syms.

6. An *authority* revoked cannot be revived, but without actual repealing it is not to be avoided. Arg. Lane 74. in case of Calvert v. Kitchin.

S. P. by Popham Ch. J. & Doderidge J. Poph. 172. in the case of Sury v. Pigot.——Cro. C. 414. Baker v. Brereman.

7. *Things of necessity* shall revive, as a *way to market or church*. Vent. 97. Mich. 22 Car. 2. B. R. in the case of POLUS v. HENSTOCK, cites *Poph. 172. & 1 Cro. BAKER v. BREREMAN; and of this opinion were the Court.

*[229]

S. P. by Popham & Doderidge.

8. But not so of *easements*. Vent. 97. cites Cro. Car. 418. Baker v. Brereman.

Poph. 172. in the case of Sury v. Pigot.

9. The *crown grants to A. who mortgages to B.* and afterwards the grant to A. is set aside. The crown 38 years after re-grants to the heir of A. Whether the re-grant to A. is subject to B's mortgage? MS. Tab. cites 3 Feb. 1719. Brown v. the E. of Morton.

(B) What Things may revive. By what Act.

1. **A**CTION on execution may be extinct by feoffment, and yet *As where the heir of the disseisor after descent, or the* may revive if the feoffment be upon condition, and he enters for the condition broken. Br. Revivings, pl. 5. cites 38 E. 3. 16. *heir of discontinuance or feme after discontinuance, &c. who have cause of action or re-entry, or if lord disseises his tenant and makes feoffment, and the heir of the disseisor, or discontinuance, or tenant re-enters, the right and title, and action and seignior is determined for ever. Br. Scire facias, pl. 88. cites 38 E. 3. 16.*

Contra if it be upon condition, and the feoffor enters for condition broken before the heir of the disseisor, discontinuance, or tenant, &c. re-enters. And so note a diversity where the feoffment is defeated by re-entry by the condition before, &c. and where not. Br. Scire facias, pl. 88. cites 38 E. 3. 16.

But execution by statute merchant, which is extinct by feoffment of the consor, made to the conseree after execution, upon condition cannot revive by entry for the breaking of the condition. Br. Revivings, pl. 2. cites 46 E. 3. 27.——Br. Audita Querela, pl. 5. cites S. C. For a thing which is determined cannot revive.

2. 7 E. 4. cap. 5. Enacts, that lands holden of a common person by fealty, rent, or other service, coming to the king's hands by attainder of treason, and being after granted by the king to another, shall be holden as if such attainder had not been. *He shall have his first rent by distress. Br. Revivings, pl. 9.*

3. If a man is attainted of treason and holds land of a common person, there if the heir of him who was attainted be restored by parliament in such form as if no such attainder had been, there the seignior of the common person, of whom he held before, is revived; quod nota. Br. Revivings, pl. 8. cites 31 H. 8.

4. If tenant in fee takes wife and makes a lease for years, and dies, and the wife is endowed: she shall avoid the lease. But after her decease the lease shall be in force again. Co. Litt. 46. a.

5. If the patron grants the next avoidance, and after parson, patron, and ordinary, before the statute, had made a lease of the glebe for years, and after the parson dies, and the grantee of the next avoidance had presented a clerk to the church, who is admitted, instituted, and inducted, and died within the term, the patron presents a new clerk, and he is admitted, instituted, and inducted; albeit he comes in under the patron that was party to the lease, yet because the last incumbent, who had the whole estate in him, avoided the lease, it shall not revive again, no more than if a feme covert levies a fine alone, if the husband enters and avoids the fine, and dies, the whole estate is avoided so as it shall not bind the wife after his death. Co. Litt. 46. a.

6. If a woman be endowed of an advowson which is appropriated, and she presents, and her incumbent is admitted, instituted and inducted, albeit the incumbent dies, yet the appropriation is wholly dissolved, because the incumbent, which came in by presentation, had the whole estate in him; and so was it adjudged as the case is to be intended. Co. Litt. 46. b.

7. Tenant in tail makes a lease for 40 years, reserving a rent, to commence 10 years after, and dies, the issue enters and infeoffs A. 10 years expire, the lessee enters; if A. accepts the rent the lease is good; *Carth. 260. this case doubted per 3 Just. contra Holt*

Ch. J. in
the case of
Simmonds
v. Cud-
more.

good; for he shall have the same election that issue in tail had, either to make it good or to avoid it, so as it could not be precisely affirmed whether by the entry of the issue this executory lease was avoided, but it depends uncertainly upon the will of the feoffee. Co. Litt. 46. b.

2 Salk. 686.
S. P. Smith
v. Tyndall.

8. Where a warranty extinguishes the right, a *release* of that warranty will set it up again. The pleading a rebutter shews it does not give a right; for the conclusion is not judgment *si actio*, but is by estoppel. Arg. 11 Mod. 90, 91. pl. 13. cites Fitzh. tit. Droit 29.

For more of *Rebate* in general, see *Action*, *Conditions*, *Ex-tinguishment*, *Manor*, *Resumptions*, and other proper Titles.

Right.

(A) The several Sorts. And of the Difference between that and Title and Interest.

* Pl. C. 487. b. Per Har- per J. Mich. 17 & 18 Eliz. in the case of Nichols v. Nichols. — S. P. 8 Rep. 151. b. accordingly in Altham's case. — Godb. 313. Arg. in the case of Sheffield v. Ratcliff.

1. **NOTE**, * there is *jus recuperandi*, *jus intrandi*, *jus habendi*, *jus retinendi*, *jus percipiendi*, *jus possidendi*. Co. Litt. 345. b.

* G. Treat. of Ten. 18. says, that the disseisor has only the naked possession, because the disseisor may enter

2. There is *jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis & possessionis*, a right both of right and possession; and this is *anciently called jus duplicatum*, or *droit droit*: for example; if a man be disseised of an acre of land, the *disseisee has jus proprietatis*, the *disseisor has jus possessionis*; and if the *disseisee releases to the disseisor*, he has *jus proprietatis & possessionis*. Co. Litt. 266. a.

and evict him; but against all other persons the disseisor has right, and in this respect only can be said to have the right of possession; for in respect to the disseisee he has no right at all. But when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseisee cannot enter upon his possession and evict him, but is put to his real action, because the freehold is cast upon the heir; and says, that the notions of the law do make this title to him, that there may be a person in being to do the feudal duties, to fill the possession, and to answer the actions of all persons whatever; and since it is the law that gives him this right, and obliges him to these duties, succedent to any act of

of his own, it must defend such possession from the act of any other person whatever till such possession be evicted by judgment; which being also the act of the law may destroy the heir's title.

If a disseisor at the time of his death has not the freehold in him it cannot be cast upon his heir; for then there is no danger that the freehold should want a possessor; therefore the law creates no title to such possession in the heir at law; for it were incongruous that the law should suppose the right of possession in the heir, when the possession is in another at the death of the ancestor. The law will not afterwards create him a new title in prejudice of the person that has the right of property.

If the disseisor therefore makes a lease for life he parts with the possession, and cannot transmit it to the heir, since he had parted with it at the time of his death, and the descent of a reversion will not make a right of possession; for nothing descends to the heir in reversion but the right of the reversion, and that is a right against all other persons but the disseisor; for since only the right descends the heir can be in no better case than the disseisor was at the time of his death; and therefore when tenant for life dies he has only the naked possession, as the disseisor had it. But if the disseisor had died in possession, the law for the reason aforesaid, casting the possession on the heir, makes it a right; for that is properly a right which a man comes to by the act of the law; and since the heir in such case would come to the possession by the act of the law, it must be called a right of possession; and it could not be a right of possession if he could not defend it against all aggressors; therefore, in such case, the right of entry is taken away from all others; and hence the distinction came to be made between *jus possessionis* and *jus proprietatis*. G. Treat. of Ten. 19, 20.

3. *Right, jus sive rectum*, (which Littleton often uses) signifies properly and specially in writs and pleadings, when an estate is turned to a right, as by discontinuance, disseisin, &c. where it shall be said, *quod jus descendit & non terra*. But (right) does also include the estate in esse in conveyances; and therefore if tenant in fee simple make a lease for years, and releases all his right in the land to the lessee and his heirs, the whole estate in fee-simple passes. And so commonly in fines the right of the land includes and passes the estate of the land, as A. cognovit tenementa prædicta esse jus ipsius B. &c. And the statute says, *jus suum defendere*, (which is) *statum suum*. Co. Litt. 345. b.

4. *Title* properly (as some say) is, when a man has a lawful cause of entry into lands whereof another is seised, for the which he can have no action, as title of condition, title of Mortmain, &c. But legally this word title includes a right also; and title is the more general word, for every right is a title, but every title is not such a right for which an action lies; and therefore *titulus est justa causa possidendi quod nostrum est*, and signifies the means whereby a man comes to land, as his title is, by fine, or feoffment, &c. And when the plaintiff, in assise, makes himself a title, the tenant may say, *veniat assisa super titulum*, which is as much as to say, upon the title which the plaintiff has made by that particular conveyance; et dicitur *titulus a tuendo*, because by it he holds and defends his land; and as by a release of a right, a title is released, so by release of a title, right is released also. Co. Litt. 345. b.

5. *Interest*. Interesse is vulgarly taken for a term or chattel real, and more particularly for a future term; in which case it is said in pleading, that he is possessed de interesse termini. But ex vi termini, in legal understanding, extends to estates or rights, that a man has, of, in, to, or out of lands; for he is truly said to have an interest in them; and by the grant of totum interesse suum in such land, as well reversions, as possessions in fee simple shall pass, and all these words singularly spoken are nomina collectiva; for by the grant of totum statum suum in land, all his estate therein passes, et sic de cæteris. Co. Litt. 345. b.

6. *Condition*

6. *Condition is not a right, but a title.* Br. Droit de Recto, pl. 35. cites 33 Aff. 11.

7. *By alienation of an advowson in Mortmain, the king has no right, but only a title.* Br. Droit de Recto, pl. 5. cites 47 E. 3. 11.

***(B) Where a Possession shall draw the Right of the Land to it.**

1. **T**HERE is a *diversity* when the possession shall draw the right of the land to it, and when not. And therefore *when the possession is first, and then a right comes thereunto*, the entry of him that has right to the possession shall gain also the right, which follows the possession, and the right of possession draws the right unto it. *But when the right is first, and then the possession comes to the right, albeit the possession be defeated; yet the right of the disseisee remains.* Co. Litt. 283. b.

As if the disseisee disseises the heir of the disseisor, 2. *When the naked right is precedent before the acquisition of the defeasible estate; there the recontinuance of the defeasible estate shall not draw with it the preceding right.* Co. Litt. 266. a.

though the heir recover the land against the disseisee, yet shall he leave the preceding right in the disseisee. Co. Litt. 266. a.

So if a woman that has right of dower disseises the heir, and he recovers the land against her, yet shall he leave the right of dower in her. Co. Litt. 266. a.

As if the heir of the disseisor is disseised, and the disseisor 3. *When the meer right is subsequent, and transferred by act in law, there though the possession be continued: yet that shall not draw the naked right with it, but shall leave it in him.* Co. Litt. 266. a.

enfeoffs the heir apparent of the disseisee being of full age, and then the disseisee dies, and the naked right descends to him, and the heir of the disseisor recovers the land against him, yet he leaves the naked right in the heir of the disseisee. Co. Litt. 266. a.

So if the discontinnee of tenant in tail enfeoffs the issue in tail of full age; and tenant in tail dies, and then the discontinnee recovers the land against him, yet he leaves the naked right in the issue. Co. Litt. 266. a.

As if A. disseises the heir of the disseisor who is in by descent, and the disseisee 4. *Regularly it holds true, that when a naked right to land is released to one that has jus possessionis, and another by a mean title recovers the land from him, the right of possession shall draw the naked right with it, and shall not leave a right to him to whom the release is made.* Co. Litt. 266. a.

releases to A. now has A. the mere right to the land; but if the heir of the disseisor enters into the land, and regains the possession, that shall draw with it the mere right to the land, and shall not regain the possession only, and leave the mere right in A. but by the continuance of the possession, the mere right is therewith vested in the heir of the disseisor. Co. Litt. 266. a.

But if the donor in tail discontinues in fee, now is the reversion of the donor turned to a naked right. If the donor releases to the discontinnee, and dies, and the issue in tail recovers the land against the discontinnee, he shall leave the reversion in the discontinnee; for the issue in tail can recover but the estate tail only, and by consequence must leave the reversion in the discontinnee; for the donor cannot have it against his release. Co. Litt. 266. a.

Br. Barre, pl. 76. S. P. cites 9 H. 7. 54. [but this 5. If the disseisee enters upon the heir of the disseisor, and makes a feoffment in fee, if the heir of the disseisor re-enters, he shall detain the

the land for ever, and the feoffee shall not maintain any writ of right; for a *bare right* shall never be left in the feoffee, but shall ever follow the possession. Co. Litt. 278. b.

is 25.]——
But if the disseisee enters upon the heir of

the disseisor, and makes a feoffment in fee upon condition, and enters for the condition broken before the heir of the disseisor enters, he is restored to his right again. Co. Litt. 278. b. 279. S. P. Co. Litt. 266. a.

So if the heir of the disseisor be disseised, and the disseisee releases to the disseisor upon condition; if the condition be broken, he shall revert the naked right. Co. Litt. 266. a.

But if the heir of the disseisor had entered before the condition broken, then the right of the disseisee had been gone for ever. Co. Litt. 266. a.

6. If a disseisor dies seised, and a stranger abates, and the disseisee [233] releases to him, the heir of the disseisor shall enter, and detain the land for ever; for the right to the possession shall draw the right of the land to it, and shall not leave a right in him to whom the release is made. Co. Litt. 279.

7. If there be tenant in tail, the remainder in fee to another, and the tenant in tail dies without issue, and a stranger intrudes, and the remainder-man brings formedon in remainder, and recovers by default, and then makes feoffment in fee, and afterwards the intruder brings action of disseisin, and reverses the recovery, in such case he in remainder * shall never have any remedy nor action; but it shall go in advantage of † him who intruded, and so it was held by the justices. Br. Barre, pl. 76. cites 9 H. 7. 6. 24.

* Because his estate is avoided by the action of disseisin. 9 H. 7. 24. b. —† He shall detain the land for ever, and the feoffee

shall not have a writ of right. Co. Litt. 279. a.

(C) An after accruing Right barred by what Conveyance.

1. **T**HERE is a difference between the nature of a release or a confirmation and a grant; for a release or confirmation are of no force, unless he who releases or confirms has a right in him at the time of the making of them; but a grant shall be good, though the grantor had no right in the thing granted in esse at the time of the grant. 19 H. 6. 62. a. b. Per Markham, in the Rector of Edington's case.

(D) Extinguished by Feoffment, &c.

1. **I**F the lord disseises his tenant, and makes feoffment in fee, and the tenant re-enters, the lord shall not have his seignior, nor the feoffee shall not have it; quod fuit concessum, per tot. Cur. Br. Barre, pl. 76. cites 9 H. 7. 24. (But it should be 25. a.)

2. If donor in tail disseises the donee, and makes feoffment, and the donee re-enters, yet the feoffee shall have the reversion in fee, and The book is, that if the tenant in tail dies

without
heir of his
body, before
entry made
by him, and

and if the *tenant in tail dies without heir of his body*, the donor has lost the reversion in fee. Br. Barre, pl. 76. cites 9 H. 7. 24. [25. a.]
the disseisor of the tenant in tail, viz. the donor, enters, now he shall hold for eve. And this was agreed for good law. 9 H. 7. 25. a.

For more of Right in general, see *Fines* (H. 2. 2) *Disseisin*,
Property, *Release*, and other proper Titles.

(A) Riots, Routs, and unlawful Assemblies. What.

S. P. Br.
Riots, pl. 4.
—Dalt.
Just. cap.
136. cites
same cases.
—S. P. 80.

1. **A RIOT** is, where three or more do an unlawful act, in fact, as to beat a man, enter upon possession, or the like. Br. Riots, pl. 5. cites it as by Marrow Serjeant, in his Definition of Riots, Routs and Assemblies, in his reading in the Inner-Temple, upon the statute of Peace.

to hunt in his park, chase, or warren, or to cut or destroy his corn, grass, or other profit. And it comes of the French word rioter, i. e. rixari. 3 Inst. 176. cap. 79.

Holt Ch. J. in delivering the opinion of the Court said, that the books are obscure in the definition of riots, and that he took it, that it is not necessary to say they assembled for that purpose; but there must be an unlawful assembly; and as to what act will make a riot or trespass, *such an act as will make a trespass will make a riot.* 11 Mod. 116. pl. 2. Trin. 6 Ann. B. R. The Queen v. Soley.

As if a number of men assemble with arms, in *terrorem populi*, though no act is done, it is a riot. Hob. 91. If three come out of an alehouse, and go armed, it is a riot. 3 H. 7. 1 Per Holt Ch. J. in delivering the opinion of the Court. 11 Mod. 116, 117. The Queen v. Soley.

Serjeant Hawkins says, a riot seems to be a *tumultuous disturbance of the peace by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprize of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful.* Hawk. Pl. C. 155. cap. 65. S. 1.

Dalt. Just.
cap. 136.
cites S. C.—
Note by
Marrow
Serj. in his
Definition
of Riots,
Routs and
Assemblies,

2. It seems by rehearsals in statutes, that if people assemble themselves and after proceed, or ride, or go forth, or move by instigation of one or several, who is conductor of them, this is a rout, inasmuch as they move and proceed in rout and number; for the statute of 18 E. 3 cap. 1. speaks of those who leading rout in the presence of the justices incur an exigent, and so it seems also by the statute of 13 H. 4. cap. ult. and 2 H. 5. cap. 8. But it

It seems that men may go peaceably and armed with weapons in their own safeguard, as commoners chasing their cattle to the common peaceably and with bastons for their defence if they hear that any will come to combat with them; tamen quære. Br. Riots, pl. 4.

in his reading in the Inner-Temple, as above, that where several ad-

semble themselves for their own quarrel, this is a rout, and against the law, though nothing be executed. As where the inhabitants of a vill assemble to break a hedge, wall, &c. to have common there, or to beat a man who has done them a common displeasure, or such like; and Brooke says, it is true, that this is one manner of rout, but the general rout appears better in the plea above; quod nota. Br. Riots, pl. 5.——S. P. 3 Inst. 176. cap. 76. And says, it is derived of the French word rout.

Serjeant Hawkins says, a rout seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intention to do a thing, which if it be executed will make them rioters, and actually making a motion towards the execution thereof: but by some books, the motion [notion] of a riot is confined to such assemblies only, as are occasioned by some grievance common to all the company, as the inclosure of land in which they all claim a right of common, &c. However, inasmuch as it generally agrees with a riot, as to all the rest of the above-mentioned particulars, requisite to constitute a riot, except only in this, that it may be a compleat offence without the execution of the intended enterprize it seems not to require any farther explication. Hawk. Pl. C. 158. cap. 65. S. 8.

3. An unlawful assembly is where a man assembles people to do an unlawful act, and does not execute it in fact. Br. Riots, pl. 5. cites it * as by Marrow Serj. in his Definition of Riots, Rout, and Assemblies, in his reading in the Inner-Temple upon the statute of Peace.

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Dalt. Just. cap. 136. cites S. C. There may be an unlawful assembly if

the people assemble themselves together for an ill purpose. Contra Pacem though they do nothing. Br. Riots, pl. 4.——Lord Coke says it is when 3 or more assemble themselves together to commit a riot or rout, and do not do it. 3 Inst. 176. cap. 79.

Serjeant Hawkins says, an unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together, with an intention to do a thing, which, if it was executed, would make them rioters, but neither actually executing it, nor making a motion toward the execution of it; but he says this seems to be much too narrow a definition; for any meeting whatsoever of great numbers of people with such circumstances of terror, as cannot but endanger the publick peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. Hawk. Pl. C. 158. cap. 65. S. 9.

4. Indictment was taken in B. R. and the case was, that the escheator took goods of a man who was outlawed, which man, before the taking, shewed writ de non molestando, &c. and yet he took them and carried them away, &c. and he came to the sheriff and took replevin, and found pledges de prosequendo and de retorno habendo if, &c. and the sheriff made precept to J. N. his servant and bailiff to execute the replevin, who took with him 300 men to execute the writ arrayed in warlike manner, viz. with brigands, jackes, and guns, and came to a certain place but did nothing else there. Keble said, this is not against the law; for the sheriff or his officer may attempt to make replevin, till they know that the king is party, and the assembly was lawful; for every one is bound to assist the sheriff, and so to his bailiff or officer, and the using of a number of men or harness is not punishable if it be not to an ill intent; as the Midsummer watch in London is not unlawful, and the same of assembling for their sport, and it is not punishable unless it were in terrorem populi regis. And it was held by all the justices that the

Dalt. Just. cap. 136.—A man was outlawed of felony, and writ of error was pending thereof in B. R. and thereupon writ de non molestando was awarded for the outlaw, directed to the escheator, commanding him that he take surety, and to deliver the beasts which

outlawry

he had taken, and he would not do it, by which writ issued to the bailiff, the sheriff, and 3 others to deliver the

outlawry and non-molestando and matter of record found by the jury was void, and that the sheriff may take as many as he pleases to execute his office in safeguard of his person; and the statute of West. 1. cap. 17. and Marl. 21 is, that after plaint made he may take the power of the county, and not before; but it was held that he might do it by the common law, and so the indictment was adjudged void. Br. Riots, pl. 2. cites 3 H. 7. 1.

beasts, whereupon they delivered 100 beasts contrary to the will of the escheator, and they command the inhabitants of five vills adjoining to assist them to deliver the rest, by which they took the rest, and delivered them to the party; and all this matter was presented by jury in B. R. and it was said that a bailiff of the king may levy people to execute precept of the king to take the body of a party, and so of a constable of a vill upon affray made he may levy people, and others said no, unless in case of taking of a felon: See Marl. 21. and West. 1. cap. 17. and West. 2. cap. 17. which declare when a sheriff or bailiffs may levy people of the king and when not, and that a bailiff ought not, but only the sheriff, and this upon certificate of resistance made to the bailiff, quod nota. Br. Riots, pl. 3 cites 3 H. 7. 10.

Hawk. Pl. C. 158. cap. 65. S. 10. S. P. and cites S. C.

5. If a man be in his house, and he hears that J. S. will come to his house to beat him, he may well make an assembly of people of his friends and neighbours to assist and aid him in safe keeping his person. Per Fineux Ch. J. Br. Riots, pl. 1. cites 21 H. 7. 39.

Dalt. Just. cap. 137.

cites S. C.

Hawk. Pl.

C. 158. cap.

65. S. 10.

cites S. C.

according-

ly, and says

that such

6. But if a man be menaced or threatened that if he comes to the market of B. or to W. that he shall be beat, he cannot make an assembly of people to assist him to go there, and this in safeguard of his person; for he need not go there, and he may have remedy by surety of the peace; but the house of a man is to him his castle and defence, and where he properly ought to abide, &c. Br. Riots, pl. 1. cites 21 H. 7. 39. Per Fineux Ch. J.

violent methods cannot but be attended with the danger of raising tumults and disorders to the disturbance of the publick peace.—Though a man may ride with arms, yet he cannot take a with him to defend himself, even though his life is threatened; for he is in the protection of the law which is sufficient for his defence. Per Holt Ch. J. in delivering the opinion of the Court. 21 Mod. 116, 117. pl. 2. Trin. 6 Ann. B. R. the Queen v. Soley.

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7. Several persons in a riotous manner endeavoured to rescue goods from the sheriff, but though they could not prevail in the rescue yet they were censured in the Star-Chamber, and he had 100l. given him by decree for his expences, though it was not known that he paid any fees in the cause. Mo. 563. pl. 768. Mich. 41 & 42 Eliz. the Att. Gen. v. Croker & al.

If they by their shews occasion an extraordinary and

8. Coke Ch. J. said, that the stage players may be indicted for a riot and unlawful assembly. Roll. Rep. 109. pl. 51. Mich. 12 Jac. Sir Anthony Ashley's case.

unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted, and fined. Dalt. Just. cap. 136. cites 2 Roll. Rep. 109. [but it should be 1 Roll. Rep. 109. pl. 50.]

9. In a riot for cutting of corn, it was agreed by the whole Court, that if a man has title to corn, although that he comes with a great number to cut it with sickles, it is no riot; but if he has not any title, although that he does not come with other weapons than with sickles, and cuts down the corn, it is a riot. Godb. 438. pl. 504. Mich. 4 Car. in the Star-Chamber. Huet and Overie's case.

10. If

10. If one goes to *assert his right with force and violence* he may be guilty of a riot. Per Cur. 12 Mod. 648. Anon. *But if a convenient number go to claim common, which is inclosed, and they pull down the inclosure, it is no riot because they go under a claim of right. Per Holt Ch. J. in delivering the opinion of the Court. 21 Mod. 117. the Queen v. Soley.*

11. If a number of people *assemble together in a lawful manner and upon a lawful occasion*, as for electing a mayor (as it was in this case) or the like, and during the assembly a *sudden affray happens*, this will not make it a riot *ab initio*; but it is only a common affray. Ld. Raym. Rep. 965. Trin. 2 Ann. Grampound Corporation's case. *If people have a lawful authority to choose a member of a corporation, and above 2 of them come*

with clamour and noise to disturb them; it will be a riot, and it is a trespass, so it is of any franchise, dean and chapter, &c. and cited 29 E. 3. 74. Regiller 103. Per Holt Ch. J. in delivering the opinion of the Court. 11 Mod. 115. pl. 2. Trin. 6 Annæ. B. R. the Queen v. Soley.

12. If a number of people *assemble in a riotous manner to do an unlawful act*, and a person, who was upon the place before upon a lawful occasion, and *not privy to their first design*, comes and joins himself with them, he will be guilty of a riot equally with the rest. Per Holt Ch. J. which Powel J. seemed to agree. Ld. Raym. Rep. 965. Trin. 2 Ann. Grampound Corporation's case. *S. P. Per Cur. 6 Mod. 43. Mich. 2 Ann. B. R. Anon.—Serjeant Hawkins says it seems*

to be certain, that if a person seeing others actually engaged in a riot, joins himself unto them, and assists them therein, he is as much a rioter, as if he had at first assembled with them for the same purpose, in as much as he had no pretence that he came innocently into the company, but appears to have joined himself unto them, with an intention to second them in the execution of their unlawful enterprise; and it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot, was in truth one of the first assembly, or actually had a previous knowledge of the design thereof. Hawk. Pl. C. 156, 157. cap. 65. S. 3.

13. Holt Ch. J. thought an assembly might meet together with such circumstances of terror as to be a riot. 2 Salk. 594, 595. pl. 4. Trin. 6 Annæ in the case of the Queen v. Soley & al.

14. If several are assembled lawfully without any ill intent and an affray happens, none are guilty but such as act; but if the assembly was originally unlawful the act of one is imputable to all. Per Holt Ch. J. 2 Salk. 595. 6 Annæ at Nisi Prius in Middlesex. The Queen v. Ellis. *[237]**

*It seems agreed, that if a number of persons, being met together at a fair, or market, or church-ale, or any other lawful and innocent occasion, happen on a sudden quarrel to fall together * by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty, but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it; yet it is said, that if persons innocently assembled together, do afterwards upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make affray, they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design; however, it seems clear, that if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house or inclosure, or to do any other act of violence, to the disturbance of the publick peace, and such motion be agreed to and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a new purpose is no way extenuated by their having met at first upon another. Hawk. Pl. C. 156, 157. cap. 65. S. 3.*

15. If 3 or more are lawfully assembled, and quarrelling, all fall on one of their own company this is no riot; but if it be on a stranger, *6 Mod. 43. Mich. 2 Annæ A. R. A. non.*

a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur, so that it is a riot in them that act and in no more. So ruled and so found by the jury. 2 Salk. 595. in Middlesex, coram Holt Ch. J. 6 Annæ. The Queen v. Ellis.

(B) What Persons may be guilty of a Riot.

1. **I**F 12 jurors (being committed to their keeper) do fall out and fight 6 against 6, this makes no riot (says Marr.) because they were lawfully assembled, and were compelled to be in company together. Lamb. Eiren. 169. cap. 5.

2. But if a number of women (or children under the age of discretion) do flock together for their own cause; this is no assembly punishable by these statutes, unless a man of discretion moved them to assemble for the doing of some unlawful act, as Mr. Marr. writes. Lamb. Eiren. 169. cap. 5.

3. If a mayor and commonalty of a town do assemble and make a rout in their common quarrel; this offence shall be adjudged and punished in their natural persons, and not in their body politick. Lamb. Eiren. 170. cap. 5.

(C) Statutes. And Power of the Justices.

By this statute one just. of the peace may record and

certify such disturbance of the peace done in his view, and may put the disturbers in ward freshly upon the fact; but if there is any mean time, he cannot then commit them to ward, though he may record it. Kelw. 41. pl. 6. Mich. 17 H. 7. Per Keble Anon.—See the note at pl. 5.

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T. and 3 others were convicted of a riot, upon view of two justices of peace, and the sheriff of the county,

1. 34 E. 3. **E**NACTS, that justices of peace shall have power cap. 1. **E** to restrain, arrest, and chastise rioters, &c. to imprison and punish them according to law.

2. 13 H. 4. cap. 7. Enacts, that the justices of peace, or two of them (at least) together with the sheriff or under-sheriff, shall by the power of the county suppress riots, routs, and unlawful assemblies, arrest the offenders, and record what shall be done: by which record of the said justices and * sheriff, or under-sheriff, the offenders shall stand convicted, as by the statute of 15 R. 2. 2. in case of forcible entries. *contra formam statuti* 13 H. 4. cap. 7. and they were fined by the justices; and upon a writ of error brought, the errors assigned were, 1st, It does not appear that the defendants were convicted by view of the justices. 2dly, That the sheriff did not join in setting the fine, whereas the statute says, that the sheriff shall be joined with the justices in the whole proceedings; and for these errors the judgment was reversed. Raym. 886. Trin. 39 Car. 2. B. R. The King v. Tempest & al'.

An indictment upon this statute was taken before two justices of peace only, without the sheriff or under-sheriff; but because it appeared to be taken a month after the riot committed, the Court held it clearly good by this statute. Comb. 178. 1 W. & M. B. R. The King v. Clench.

Where the conviction of a riot is made on this statute upon view only, there the sheriff or under-sheriff must be present; but it is not necessary where the conviction is upon an inquiry taken after the riot is ended. And this is the difference. Carth. 383. Trin. 8 W. 3. B. R. The King v. Ingram.—S. P. And the reason of the attendance on the view is, that he may raise the posse comitatus to suppress the rioters, which needs not when they are dispersed, the justices having a lawful

lawful jurisdiction. Comb. 423. Pasch. 9 W. 3. B. R. S. C. ——— Salk. 599. S. C. accordingly. ——— 12 Mod. 123. Pasch. 9 W. 3. S. C. by name of the King v. Page, Ingram & al. accordingly. ——— Ld. Raym. Rep. 215. S. C. accordingly.

*And if the offenders be departed, the said justices, and sheriff, or under-sheriff, shall within a * month after make enquiry thereof, and hear and determine the same according to law.*

An information against 9 justices of peace, for

not making enquiry of a very great riot done by several persons, in burning hedges, &c. within a month after the fact done; and because the statute says nothing of any complaint or notice being to be made, or given to them, it was moved by some, that they were bound by law to take notice at their peril; but diverse other justices were of a contrary opinion. Ideo quære bene the words of the statute of 13 H. 4. cap. 7. and the law. But the Reporter says, it seems reasonable that notice or complaint be made to them; for so is the statute of R. 2. of forcible entries, whereof mention is made in this statute of 13 H. 4. Besides, justices of assize are under the like penalty of 100l. if such riot, &c. be committed in their presence sitting in their sessions, and consequently they are not so in case they are absent, and no complaint or notice be given to them. D. 210. b. pl. 25. Hill. 4 Eliz. The Attorney General v. Grassley & al.

* The month shall not be confined to 28 days, but to the *almanack month*. Per Curiam. Sid. 186. pl. 9. Pasch. 16 Car. 2. B. R. The King v. Cussens & al. ——— Hawk. 163. cap. 65. S. 31. says, it is not clearly settled whether the month, within which the justices of peace are confined to take their inquiry by force of these statutes, must be reckoned according to the computation of a lunar or of a solar month; however, it seems to be agreed, that if the justices give their charge to the jury, and it is said that if they do but *award a precept for the returning of the jury* within a lunar month, they may take the verdict afterwards; for the cause being regularly attached in them within the time prescribed by the statute shall be prosecuted, as all other causes ought, with such convenient dispatch as to the judges thereof shall seem proper; and the statute, by obliging the justices to make so speedy an inquiry, meant not to hurry them in the execution of it.

Though this statute is mandatory, that the *inquisition shall be taken within a month under a penalty* in the neighbouring justices, yet after the month it is still † discretionary in the justices to take an inquisition, &c. and that by construction of the last clause of this statute (which says that they *shall do execution of this act*, in pain of 100l.) and it hath ever been the practice to take such inquisitions † out of sessions. Carth. 384. The King v. Ingram. ——— S. C. and P. Comb. 423. and the time is only mandatory.

† An inquiry after the month is good; for the statute intended only to hasten their proceedings by subjecting them to the penalty, and not to restrain their authority. Ld. Raym. Rep. 215. S. C. ——— 12 Mod. 123. S. C. and S. P.

‡ Sid. 186. in case of the King v. Cussens & al. it was said that justices of peace cannot take inquisitions of riots, &c. but only in their sessions; but the Reporter says, quære de ceo.

The *inquisition may be taken any where else as well as on the place; but if* information be given to the justices, that *the riot continues, they must go and convict them, and record it upon their view*, under the penalty of 100l. *But where the riot does not continue, they may enquire at any time within a month.* And per Holt Ch. J. if they will not inquire within the month, they forfeit the penalty; but yet they may inquire *after*, viz. *When they have issued a precept within the month to inquire.* 6 Mod. 140, 141. Pasch. 3 Ann. B. R. The Queen v. Pugh & al.

If the *inquisition be made at several times*, it seems it is good enough, such an objection being disallowed. Carth. 383. The King v. Ingram.

And though it was objected, that the fact found before the justices of peace was not only *vi & armis*, but also *manu forti*, of which the justices had no power to inquire by this statute, or by the statute of 19 H. 7. 13. yet it was not allowed. Carth. 383, 384. The King v. Ingram.

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*If upon such inquiry the truth cannot be discovered in manner aforesaid, then shall the said officers within a month after such inquiry, * certify the fault, together with the circumstances thereof unto the king and his council, which certificate of theirs shall be in the nature of a presentment by 12. § whereupon the defendant shall be brought to answer, and those that be found guilty shall be punished at discretion of the king and his council.*

* Lambert says, it seems to him that the same ought to be done either to the body (and board)

of the privy counsel, or into the Star-Chamber, at the least, because the statute itself does by express words distinguish the king and his council here, both from the Chancery and from B. R. which in many other cases be taken for the king and his council also. And this he does the rather note, because he had read of certificates of this kind sent by justices of the peace into the Star-Chamber; and for that it is penal to those justices, sheriffs or under-sheriffs, if they shall not address their certificate as the statute doth appoint them. Lamb. Eiren. 321. cap. 1.

If the offenders traverse the said certificate, then that, together with the traverse, shall be sent into the King's Bench there to be tried.

If the offenders, upon the first precept, do not appear before the council, or in B. R. a 2d precept shall issue forth, upon which, if they cannot be found, or within 3 weeks after proclamation made against them in the next county court after the delivery of the 2d precept, they do not make their appearance before the council in B. R. or in the Chancery (in vacation-time) upon the return of the said proclamation, they shall stand convicted, and attainted of the offence committed.

• It is not necessary that the next justices only should remove a

*Justices of the peace dwelling * nighest the place where such offences shall be committed, together with the sheriff or under-sheriff, and also the justices of assise, for the time they shall be in their sessions (in case any be made in their presence,) shall do execution of this act, every one in pain of 100l.*

force, but all the justices of the county are bound to it: and these words in the statute, viz. That the 2 next justices shall do it, are put but for conveniency, and the more speedy execution of justice. Per Roll, Jerman, and Ask, justices; but Nicholas J. doubted of this. Sty. 246. Hill. 1650. in case of Custodes, &c. v. Maine and Serjeant

Hawk. Pl. C. 165, 166. cap. 65. sect. 45. &c. The Serjeant says, that in the construction of this clause of this statute, the following opinions have been holden.

1st, That no justice of peace is in danger of incurring the penalty thereof, unless he dwell in the county wherein a riot happens.

2dly, That if any justices of peace, who do not dwell nearest to the place, do actually execute the statute, they excuse all the rest.

3dly, That if the justices whose dwelling was nearest at the time of the riot, or one of them, happen to die within the month, those whose dwelling is thereby become the nearest, are bound to execute the statute in the same manner as the others were.

4thly, That notwithstanding those justices only, who dwell nearest, are liable to the penalty of the statute, yet if any others on notice neglect to supply their default, they are fineable at discretion.

5thly, That if the 2 justices, or one of them, do their duty in executing, or endeavouring to execute the statute, they shall not incur any penalty through a default of the sheriff, &c. either in refusing to appear, or to return a jury, &c.

6thly, That the said justices, &c. shall not avoid the penalty by executing the statute in part only, as by recording a riot without committing the parties.

7thly, That no justice, &c. is subject to the penalty of the said statute, on account of a petit riot, but only of such as are notorious, and in nature of insurrections and rebellions.

8thly, That if a justice of peace, &c. had no express notice given him of the riot, he shall be excused, unless it were so very flagrant, that by common intendment every one dwelling near it could not but have notice thereof.

9thly, That the acquiescence or agreement of the parties aggrieved is no excuse to the justices, because they ought, ex officio, to make the inquiry, and make proclamation whether any will give evidence for the king, &c. and may bind such of the parties grieved, as shall refuse to prosecute their complaint, to their good behaviour.

3. 2 H. 5. stat. 1. cap. 8. S. 1. Enacts, That upon any default of the justices of peace, &c. touching the execution of 13 H. 4. a commission shall be awarded, at the instance of the party grieved, to enquire as well of the truth of the case as of the default of the said justices, &c. and that the said commissioners shall immediately return into Chancery the inquests taken before them; and that the coroner of the county shall make the panel for the time, that any sheriff supposed to be in default, shall continue in his office; and that the jurors who shall make inquiry, shall be worth 10l. per ann. and shall be returned by the coroners, if the sheriff, supposed to be in default, continue in his office, &c.

4. 2 H. 5. stat. 1. cap. 9. Enacts, that the Lord Chancellor, upon complaint made to him, that a dangerous rioter is fled unto places unknown, * provided that it be upon a suggestion under the seals of two justices of peace, and the sheriff, that the common fame and voice runneth in the county where such riot was, may award a *capias* against the party returnable in Chancery, upon a certain day, &c. and afterwards a writ of proclamation returnable in B. R. &c. and that the jurors, to inquire of a riot, shall have 20s. a year freehold, or 1l. 6s. 8d. copyhold.

Made perpetual by 8 H. 6. cap. 14.

5. *Trespass of assault, battery and imprisonment against J. K. and others, the defendant said, that at the time of the trespass they were servants to Sir Thomas Green, who at the time, &c. was a justice of peace of our lord the king in the same county, by letters patents of the king, and that it was shewed to the same Sir Thomas Green, that the plaintiffs were riotously assembled with force, &c. at D. where the trespass is supposed, by which the said justice went to D. to see the peace kept, and found them riotously assembled and armed, by which the defendants, as servants to him, and by his command adtunc & ibidem, came to arrest them, who would not obey them, nor the command of the said justice, by which they put them in the gaol, which is the same trespass. And by the best opinion, and in a manner by all, that in the absence of the justice he who makes the arrest, ought to have warrant; for a justice of record cannot command out of his presence, unless by precept in writing. Br. Peace, &c. pl. 7. cites 14 H. 7. 8.*

Hawk. Pl. C. 160. cap. 65. S. 16. says the statute 34 E. 3. cap. 1. has been liberally construed for the advancement of justice; for it has been resolved, that if a justice of peace finds persons riotously assembled, he without staying for

his companions, has not only power to arrest the offenders, and bind them to their good behaviour, or imprison them, if they do not offer good bail, but that he may also authorize others to arrest them by a bare parol command without other warrant, and that by force thereof the persons, so commanded, may pursue and arrest the offenders in his absence, as well as presence: it is also said, that if a justice of peace be sick, and hear that persons are riotously assembled, he may send his servants to arrest them, and bring them before him; and that if he hear that persons are riotously together in a certain place, and goes thither, and finds none there, he may leave his servants behind him, with a command to arrest them when they shall come. Also it is said, that after a riot is over, any one justice of peace may send his warrant to arrest any person who was concerned in it, and also that he may send him to gaol till he shall find sureties for his good behaviour.

6. 1 Geo. 1. cap. 5. S. 1. Enacts, that if any persons, to the number of 12 or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the publick peace, and being required or communded by any justice of peace, sheriff of the county, or under-sheriff, or by the mayor, bailiff or bailiffs, or any head-officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the king's name, (as therein is after directed) immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, under the pains of the said statute, shall afterwards unlawfully, riotously, and tumultuously continue together for the space of one hour after such proclamation made, or after a wilful let or hindrance of a justice of peace, &c. from making the said proclamation, shall be adjudged felons without benefit of the clergy.

S. 4. And if any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the publick peace, shall demolish or pull down, or begin to demolish or pull down, any church, chapel,

chapel, or building, for religious worship, certified and registered according to 1 W. & M. 18. commonly called *The Toleration Act*, or any dwelling-house, barn, stable, or other out-house, they shall be adjudged felons without benefit of clergy.

S. 5. And if any person or persons shall with force and arms wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly, let, hinder, or hurt any person, &c. who shall begin to proclaim, or go about to make proclamation as therein appointed, whereby such proclamation shall not be made, shall be adjudged felons without benefit of clergy.

S. 6. And whenever any such church, &c. shall be demolished, &c. by any such rioters, &c. the inhabitants of the town or hundred, wherein the riot happened, shall be bound to make good the damage, &c.

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S. 8. Provided that such offenders be prosecuted within one year after the offence committed.

S. 10. This act to extend to Scotland.

(D) Informations and Indictments. Good or not.

1. **E**XCEPTION was taken to an indictment that *Bricket and the other rioters are named of Nun-eaton in the county of W. and that they assembled themselves at Artleborough in the parish of Nun-eaton aforesaid; and says not in what county Artleborough is; for it was said, that Artleborough may be in the parish of Nun-eaton and yet in another county, but the Court held it well enough; for it appears not that Artleborough is a town, but it may be a lieu conus in the parish of Nun-eaton, and being named in the parish of Nun-eaton, it shall be intended to be in the same county. Cro. E. 108. pl. 3. Mich. 30 and 31 Eliz. B. R. Bricket & al.*

2. An indictment of riot and battery, &c. *Contra formam diversorum statutorum* was ruled to be good, though it mentioned no statute in certain; and the clerks of the court said there were divers precedents thereof. Noy. 132. Darcy's case.

3. Several were indicted for a riot, and *no addition of place to any of them but to the last*; and he was called B. R. de Huttoft, yeoman. Per Williams J. the word yeoman goes to them all, but the place, viz. Huttoft goes only to the last, and so for want of addition of place, where the others dwelt, the indictment was quashed. Bulst. 183. Pasch. 10 Jac. The King v. Hastings.

4. An indictment for a riot was quashed because it wanted the words *proborum & legalium hominum*. 2 Roll. Rep. 400. Mich. 21 Jac. B. R. The King v. Miller.

The Report at first states it, that a verdict was given against them. But the motion in arrest of judgment

5. A joint information was exhibited against 2 justices for not inquiring of a riot; one was found guilty, and the other acquitted; it was moved in arrest of judgment, that there ought to have been several informations, because the offences are several; besides, no judgment could be given against him who was found guilty, because the other was acquitted. But per tot. Cur. the execution may be several, and it is not material, though one be acquitted, and the

the other found guilty. Style 245. Hill. 1650. B. R. The Keepers, &c. v. Maine and Serjeant. was founded upon the finding one
guilty, and the other not, as well as upon the information being joint; and so it seems by the answer of the justices.

6. An information for a riot concluded *contra formam statuti* 13 H. 4. After verdict it was moved in arrest of judgment, that this information was not good, being grounded on this statute, which only mentions riots and appoints them to be punished in the manner there expressed; but Keyling Ch. J. was of opinion, that it being a crime at common law, and mentioned in this statute, the information was well concluded; but the other justices inclined to the contrary. Vent. 43 Mich. 21 Car. 2. B. R. The King v. Monk & al.

7. An indictment was, that the defendants *vi & armis, &c. riotosi & routosi seipsos congregaverunt, &c. cum intentione ad aliquid illicitum ibidem agendum & pacem domini regis perturbandum, &c.* And that they, so assembled, cut down quoddam quercus, &c. & quercum illud, &c. It was insisted in maintenance of this indictment, 1st, That it was not necessary to shew what unlawful act they assembled to do, provided they did assemble to do an unlawful act; for if they assembled to do one act and did another it would be a riot. 2dly, It appeared they did do an unlawful act, for they cut down an oak, and the false Latin could not vitiate; sed non allocatur: for per Curiam it is too general, and the act ought to be shewn, that the Court might judge whether the act was unlawful or not. Besides they said they would not encourage such ill-drawn indictments, &c. and therefore it was quashed. 2 Ld. Raym. Rep. 1210. Mich. 4 Ann. B. R. The Queen v. Gulston, Stubbs, & al. [242]

8. Information for that the defendants *with force and arms clamoribus & vociferationibus illicite, riotosi & routosi* did hinder the bailiff and burgesses of Bewdley, who were assembled on such a day and place to chuse a bailiff for the said borough, &c. to proceed to the election. The defendants were found guilty, but the judgment was arrested. 1st, Because it did not appear that any right is claimed, nor any such franchise pretended to, so that the bailiff, &c. might be doing an unlawful act; but if they had shewed a right to this franchise, then this might be a disturbance to them in the use of it. 2dly, Because it is not said that the defendants unlawfully assembled themselves; for a riot is a compound offence. There must be not only an unlawful act to be done, but an unlawful assembly of more than two. 2 Salk. 594. pl. 3. Trin. 6 Annæ B. R. The Queen v. Soley.

9. An information was for that the defendants *assembled riotosi, routosi, and illicite, to disturb the peace, did with force and arms ostium cujusdam domus, vocat the Guildhall Burgi de Bewdley, being shut, &c. throw off from the hinges.* The defendants were convicted; but upon motion this judgment was arrested, because it did not appear whose house it was; for it might be the defendant's house, and then it was no unlawful act, and a riot must arise from

an unlawful act. And the saying vocat. the Guildhall burgei does not make it to be so. *The Guildhall may belong to a private person*, as well as to the borough. 2 Salk. 594. pl. 4. Trin. 6 Annæ B. R. The Queen v. Soley.

10. *Indictment for a riot on a petty constable* in the execution of his office; and upon a demurrer it was objected that this indictment was ill, because it was *for a riot in and super pet. con'bularium*, when there is no such word as pet. which was granted on the other side, but that con'bularium with a dash made the indictment good. Per Cur. the word *pet.* is *surplusage*, and shall therefore be rejected, and the indictment is good without it, for the other word makes it good. Judgment for the king. 8 Mod. 327. Mich. 11 Geo. 1725. The King v. Harris.

11. Indictment for a riot was, that the defendants *assembled illicite, riotoſe & routoſe, & illicite, riotoſe & routoſe fregerunt & proſtraverunt palas, and took away, &c.* And did not say *vi et armis*. Per Raym. Ch. when the fact implies a force, the addition of *vi et armis* is not material, here it is *riotoſe, &c. fregerunt & proſtraverunt palas, &c.* which necessarily implies a force and trespass. And per tot. Cur. the indictment is well enough. Gibb. 63. Paſch. 2 Geo. 2. B. R. The King v. Myne & al.

(E) Proceedings, Pleadings, and Verdict.

1. **A**N indictment for a riot was *against 3, and the jury found only one of them guilty* of the riot, this is a void verdict; for one alone cannot make a riot. Arg. Poph. 202. Mich. 2 Car. B. R. in the case of Harrison v. Errington.

2. Information against the defendants, for that they, with others, did *riotously assemble to divert a water-course, and that they set up a bank in such a place, by which the water was hindered from running to an ancient mill in so plentiful a manner as formerly, &c.*

[243] Upon not guilty pleaded, the jury found *the defendants guilty quoad setting up the bank, but quoad the riot not guilty*. It was moved in arrest of judgment, that by this verdict the defendants are acquitted of the charge in the information, which was the riot, and that an action on the case would lie for erecting the bank; and judgment was arrested. 3 Mod. 72. Mich. 1 Jac. 2. B. R. The King v. Colson & al.

3. C. appeared upon his recognizance, and an information being filed against him and others, he was charged to plead to it, as had been the practice; but upon debate it was said, that he need not, and was not compellable; *and was allowed to appear, and imparle till the next term*. Show. 56. Mich. 1 W. & M. The King v. Sir Thomas Cox.

4. An information for a riot in *breaking fences and inclosure in Hartfordshire lies in the Crown-Office*. See Show. 106. Mich. 1 W. & M. The King v. Berchet & al.

When

5. When the conviction of a riot is by inquisition taken before 2 justices of peace, the inquisition has no need to be, as taken *pro domino rege & corpore comitatus*, but *pro domino rege* is sufficient, or rather better; for their enquiry is not for the county, but for the king, and so is the constant form of such inquest. But when an inquisition is by the grand jury, then it ought to be *pro domino rege & corpore comitatus*. Sir William Williams objected, that *et corpore comitatus* was ill, because their authority was not divided or derived partly from the king and partly from the county, but from the king only, and executed only for him; and therefore (by him) it ought not to be *pro corpore comitatus*. But this nicety was not regarded; and the Court seemed to be of opinion, that they were the same. *Ld. Raym. Rep. 215. East. 9 W. 3. The King v. Ingram & al.*

A special inquisition is always *pro domino rege*; but if it be at the assizes, or before justices of oyer and terminer, then it is *pro corpore comitatus*. 12 Mod. 123. Resolved. The king v. Page,

Ingram & al. S. C.

6. Indictment that the defendants *riotose, routose, & illicite assemblerunt, & sic assemblati insultum fecerunt* in quendam J. R. &c. Upon not guilty pleaded 2 were found guilty and the rest acquitted. It was moved in arrest of judgment, that 2 cannot make a riot, and therefore cannot be guilty of a riot, and by consequence all are acquitted by this verdict: to which it was said, that there is a battery, and that 2 may be guilty of that. But per Holt Ch. J. a riot is a specific offence, and the battery is not laid a charge of itself; for those adverbs, *riotose & routose* go through the whole, and is ascribed to the battery as well as to the assembly; so that a discharge of the riot is a discharge likewise of the battery, and judgment was arrested. 2 Salk. 593. pl. 2. Pasch. 11 W. 3. B. R. The King v. Heaps.

S. C. by the name of the King v. Sudbury and Heaps, accordingly. 12 Mod. 262. But per Holt, if the indictment had been, that the defendants, with divers other disturbers of the peace,

had committed this riot, and verdict had been in this case, the king might have judgment. S. C. cited per Parker Ch. J. 1 Salk. 385. pl. 37. Mich. 11 Annæ, at Nisi Prius, in the case of the Queen v. Cranage. Ld. Raym. Rep. 484. S. C. accordingly. And per Holt, the battery is but part of the riot.

7. The caption of an inquisition taken before 2 justices for a riot, upon the statute of 13 H. 4. cap. 7. was thus, (viz.) An inquisition taken for the queen in the county of H. upon the oath, &c. of 12 honest and lawful men, &c. who then and there impannellat' jurat' & triat', &c. to enquire of riots contra formam statuti generally. Exception was taken, that the inquisition did not mention any thing concerning that statute; sed non allocatur: for per Cur. the justices have power by this statute to enquire of all riots and routs whatsoever; and if a forcible entry be made, they may find according to the statute 8 H. 6. cap. 9. and award restitution; for a subsequent statute, which inflicts a greater punishment, doth not take away the power given by a precedent statute. 6 Mod. 140, 141. Pasch. 3 Annæ, B. R. The Queen v. Pugh & al.

8. Several were indicted for a riot; it was moved, that the prosecutor might name 2 or 3 and try it against them, and that the rest might enter into a rule, if they were found guilty, to plead guilty too; and this was said to be done frequently to prevent the charge

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of putting them all to plead; and a rule was made accordingly:
6 Mod. 212. Trin. 3 Annæ, B. R. The Queen v. Middlemore.

For more of Riots in general, see *Fortible Entry*, *Treason*,
and other proper Titles.

Rivers.

Hawk. 199. cap. 75. S. 11. says, it is a common nuisance to divert a navigable river in such manner as here is mentioned.

1. **M.** WAS fined 200l. for *diverting part of the river Thames*, by which he weakened the current of the river to carry barges, &c. towards London, and other houses of the king upon the river; and such a thing cannot be done without an *ad quod damnum*; because that river is a *highway*, and also it ought to be by patent of the king for to do such a thing. Noy. 103. Hind v. Manfield.

2. *Who shall be obliged to cleanse a river, that, by being stopped, becomes a nuisance to the country.* See Nuisance (A)

For more of Rivers in general, see *Action*, *Indictments*, *Dofle*, and other proper Titles.

Robbery.

(A) *What is; in respect of the Value of the Thing taken.*

* Though the thing taken be not of greater value than

1. **T**HOUGH it be under the value of 12d. that is taken, (as to the value of * 1d. or 2d.) it is robbery, but *something must be taken; for the making assault only to rob, without taking*

taking some money or goods, is no felony; and such opinions as seem to the contrary, were maintained by that, which then was anciently holden, quod voluntas reputabitur pro facto. 3 Inst. 69. cap. 16.

Hawk. Pl. C. 97. cap. 34. S. 12. S. P.

(B) What is or amounts to a Robbery in respect of the Manner or Person from whom.

1. ROBBERY is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear and taking from his person his money or other goods of any value whatsoever. 3 Inst. 68. cap. 16.

2. The circumstance of putting one in fear makes the difference between a robber and a cut-purse; both take it from the person, but this takes it clam and secret without assault or putting in fear, and the robber by violent assault and putting in fear. 3 Inst. 68. cap. 16.

Wherever a person assaults another with such circumstances of terror as

put him into fear, and causes him, by reason of such fear, to part with his money, the taking thereof is adjudged robbery, whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it him upon his ceasing to use force, and begging an alms; for he was put into fear by his assault, and gives him his money to get rid of him. Hawk. Pl. C. 96, 97. cap. 34. S. 9.

3. The words of the indictment, *violenter & felonice cepit*, must be understood that there is an actual taking in deed, and a taking in law, and that may be when a thief receives, &c. For example: if thieves rob a true man, and find but little about him, take it, this is an actual taking; and by means of death compel him to swear upon a book to fetch them a greater sum, which he does and delivers it to them, which they receive, this is a taking in law by them, and adjudged robbery; for fear made him to take the oath, and the oath and fear continuing, made him bring the money, which amounts to a taking in law; and in this case there needs no special indictment, but the general indictment (*quod violenter & felonice cepit*) is sufficient. And so it is if at the first the true man for fear deliver his purse, &c. to the thief. 3 Inst. 68. cap. 16.

Serjeant Hawkins says, it seems clear that he who receives my money by my delivery, either while I am under the terror of his assault, or afterwards while I think myself bound in conscience to give

it him by an oath to that purpose, which in my fear I was compelled by him to take, may, in the eye of the law, as properly be said to take it from me, as he who actually takes it out of my pocket with his own hands. Hawk. Pl. C. 96. cap. 34. S. 4.

4. This word (*cepit*) necessarily implies, that the thief must be in possession of the thing stolen. For example: * if the bag or purse of the true man be fastened to his girdle, &c. and the thief, the more easily to take the bag or purse, cuts the girdle, whereby the bag or purse falls to the ground, this is no taking; for the thief had never any possession thereof, & sic de similibus: but if the thief takes up the bag or purse, and in striving had let it fall, and never took it again, this had been a taking, because he had it

* S. P. Hawk. Pl. C. 96. cap. 34. S. 6. But though he is not guilty of robbery, he is highly punishable by fine and imprisonment, &c.

for so enormous a breach of the peace. in his possession ; for the continuance of his possession is not required by law. 3 Inst. 69. cap. 16.

§ S. P. And so if he drives my cattle in my presence out of my pasture, or my hat which fell from my head, he may be indicted as having taken things from my person. Hawk. Pl. C. 96. cap. 34. S. 8.

5. The words of the indictment are (*a persona*) &c. If the true man, seeking to escape for the safeguard of his money, § casts it into a bush, * which the thief perceiving, takes it : this is a taking in law from the person, because it is done at one time. 3 Inst. 69. cap. 16.

And so it is of the horse of a true man, which stands by him : et sic de simili-bus. 3 Inst. 69. cap. 16.

6. If the true man had cast off his surcoat, or other uppermost garment, and the same lying in his presence, a thief assaults him, &c. and takes the surcoat, this is robbery ; for that which is taken in his presence, is in law taken from his person. 3 Inst. 69. cap. 16.

In some cases, a man may be said to rob me, where in truth he never actually had any of my goods in his possession,

7. Upon not guilty pleaded to an indictment the evidence was, that P. and Q. met W. S. and W. T. in the highway, where they endeavoured to rob them, and for that purpose drew their swords and offered to strike them, thereupon W. S. rode away one way, and P. pursued him, and W. T. went another way, and Q. followed and robbed him out of sight or hearing of P. and it was held that P. was as principal, and committed the robbery, and he was hanged. And. 116. pl. 161. Hill. 26 Eliz. Pudsey's case.

as where I am robbed by several in one gang, and one of them only takes my money, in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to one another, through the hopes of mutual assistance in their enterprise : nay, though they miss of their first intended prize, and one of them afterwards rides from the rest, and robs a third person in the same highway, without their knowledge, out of their view, and then returns to them, all are guilty of robbery ; for they came together with an intent to rob, and to assist one another in so doing. Hawk. Pl. C. 96. cap. 34. S. 7.

8. If a carrier's man or son conspire to rob him, and do it accordingly, the carrier not being privy to it, he may sue the hundred on the statute of Winton ; but the conspiracy may be given in evidence in mitigation of damages ; per Roll Ch. J. Style 427. Mich. 1654. Matthew v. the Hundred of Godalmin.

9. If a man's servant be robbed of his master's goods in his master's sight, this shall be taken for a robbing of the master. Style 156. Mich. 1649. Per Roll Ch. J. in Wright's case.

10. If one casts away his goods to save them from a robber, and the robber takes them up, and carries them away, this is a robbery done to his person. Per Roll. Ch. J. Sty. 156. Mich. 1649. Wright's case.

11. Taking cattle from A. which he is driving on the highway, is a taking from his person, and so a robbery ; per Powel. J. Quod non fuit negatum. 2 Salk. 641. Green v. Goddard.

Hawk. Pl. C. 97. cap. 34. S. 11. says, it is certain that

12. In an indictment against the defendant for robbing one Thomas Holder, a Custom-house officer, of goods belonging to persons unknown, the fact appeared upon the evidence to be, that Holder

Holder had lately made a seizure of tea (being the goods in question) for being run, and hid clandestinely in a barn, and as he was riding off with, and carrying them upon the road, the defendant met him, and demanded the goods, insisting that they were his, and presented a pistol to him, and threatened to kill him if he did not deliver them. And upon that Holder said to the prisoner, if I was to give you part of them you would laugh at me another time? No the prisoner told him he would not, and he would be contented. Whereupon Holder delivered him part of the tea; and for taking this parcel of tea so delivered to him, the prisoner was indicted of robbery. The counsel for the king insisted, that by the seizure Holder gained a special property in the tea, and though he made the offer of parting with some of it, to save the rest, yet the offer was made under terror of the threat, and consequently could not lessen the offence. However the judge who tried the cause, was of opinion, that as this was only a *claim of property* by the prisoner, the indictment could not be maintained; accordingly the prisoner was discharged. 2 Barnard. Rep. in B. R. 174, 175. Trin. 5 Geo. 2. The King v. Smith.

claim of property without any colour is no manner of excuse, and in the margin H. P. C. 1st edition, 62.

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13. 7 Geo. 2. cap. 21. S. 1. Enacts, that if any person shall, with offensive weapon, unlawfully or maliciously assault, or shall by menaces, or in any violent manner, demand money or goods from any person, with a felonious intent to rob such person; he shall be guilty of felony, and shall be transported for seven years.

(C) What is a Robbery within the Statute. In respect of the Time when done.

1. **T**HOUGH the statute is general, and mentions no time, yet the robbery must be done in the day-time, and *not in the night*; but the robbery being done in January, presently after sun-set, during day-light; it was adjudged that the hundred shall answer; because it is a time convenient for people to travel, and be about their business. 7 Rep. 6. a. b. Trin. 28 Eliz. Ashpole v. Evenger Hundred.

Le. 57. pl. 72. Pasch. 29 Eliz. C. B. S. C. by the name of ARCHPOLE v. EVERINGHAM HUNDRED, and the jus-

tices were all clear of opinion, that if the robbery was done in the night-time, the inhabitants are not bound to make the pursuit. — 4 Le. 218. pl. 352. S. C. Trin. 29 Eliz. C. B. And the justices were of opinion that it being found by the verdict, that the robbery was done post occasum solis & per lucem diurnam, the hundred should be charged; for that at such time travellers are commonly drawing to their lodgings, and afterwards judgment was given for the plaintiff. — And. 158. pl. 202. S. C. accordingly. — S. C. Goldsb. 50. pl. 10. adjournatur. & 60. pl. 12. S. C. adjudged for the plaintiff accordingly. — So in an action sur le statute de Winton of hue and cry. The jury found, that the robbery was done post lucem ejusdem diei & ante ortum solis Anglice, after day-break and before sun rising; and upon this the Court advised, and judgment was given for the plaintiff, and a precedent shewn Pasch. 28 Eliz. Rot. 130. where the robbery was done post occasum solis, & per diurnum lumen Anglice daylight, and there adjudged for the plaintiff. Cro. J. 106. pl. 45. Mich. 3 Jac. B. R. May v. Morley Inhabitants.

But where a robbery was done about 3 o'clock in the morning before day-light, the judges all agreed that the hundred should not be charged; and commanded judgment to be entered accordingly. Goldsb. 70. pl. 14. Mich. 29 & 30 Eliz. The case of the Hundred of Dunmow in Essex. — 4 Le. 59. pl. 149. Trin. 28 Eliz. C. B. S. C. by the name of MILBOURN v. DUNMOW HUNDRED, in Essex adjudged accordingly; for the inhabitants are not bound to leave their houses and attend the way in the night-time, and also because the statute appoints watch to be kept in the night-time from Ascension-Day to Michaelmas, whereas this robbery was done the 23d of April, and

and judgment was given against the plaintiff.——4 Le. 191. pl. 802. S. C. reported in the same words.——Sav. 83. pl. 163. S. C. adjudged for the defendants per tot. Cur.——7 Rep. 6. b. S. C. adjudged accordingly.——S. C. cited as adjudged. And. 157. pl. 202. in the case of Ashpole v. Evinger Hundred.——S. P. 2 Inst. 569.

The statute speaks of robberies done in the day before night, yet if a robbery be committed *in the morning before day, or in the evening after the day, in any time of the night in which men use commonly to travel*, the hundred is answerable for it; but if it be at twelve or one of the clock in the night, at which time every one is intended to be in bed, the hundred is not answerable for the robbery. Cro. E. 270. pl. 12. Hill. 34 Eliz. in Scacc. Ridgeley v. the Hundred of Warrington.

If a robbery be done *in crepusculo* the hundred shall not be charged; but if it be done by clear day-light whether it be before sun rise or after sun-set it is all one; for the hundred shall be charged in both cases. Per Cur. Sty. 233. Mich. 1650. Bennet v. Hartford Hundred.

If the *assault be in A. in the day, and the party be carried into B. and robbed in the night*, no action lies. Per Holt Ch. J. 11 Mod. 12. Pasch. 1 Ann. B. R. *Comyns v. Bazingstoke Hundred.*

2. If robbers *drive a waggon, or cause the waggoner to drive it out of the highway in the day-time, but do not rob the waggon till night*; this is a robbery in the day-time, because the first seizure is the robbery. Sid. 263. pl. 13. Trin. 17 Car. 2. B. R. *Pledall v. the Hundred of Thistleworth.*

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Before the making this statute, a person who travelled upon the sabbath-day in the time of divine service was robbed, and this being found by special verdict, the question was, whether the hundred was chargeable, and by Haughton, Doderidge, and Crooke J. adjudged, that it was not; but Mountague Ch. J. e contra totis viribus, as the Reporter said he heard. 2 Roll. Rep. 10. in the Hundred of Stoke's case.——Waite v. the Hundred of Stoke S. C. Cro. J. 456. pl. 2. accordingly, together with the reasons of the judges pro and con, because, as it says, it was a robbery, and had never before been questioned.——S. C. adjudged accordingly. Godb. 17.

3. S. 5. 29 Car. 2 cap. 7. S. 5. Enacts, that if any person travelling on a Sunday shall be robbed, he shall be disabled to bring any action against the hundred; but the inhabitants shall make restitution every upon notice of such robbery, upon pain of forfeiting to the king, as much as might have been recovered against the hundred, if restitution had not been made.

But where a gentleman and his wife had been at the wife's father's house from the 10th of April following, and were then, being a Sunday, going to the parish church, 2 miles distant, with the father in his coach, and were robbed going thither, it was insisted that going to the parish church could not be called a travelling within this statute, which was made for the better observation of the Lord's day, and confirms the statutes made for the publick service of religion, and by the statute 1 Eliz. every one is to resort to his parish church on the Lord's day; but that the travelling prohibited by this act was such as tended to the profanation of that day, and the hundred by the statute is liable to the king, though the party could not have an action where he was robbed on travelling, &c. and therefore the barring the action in such case was intended as a penalty, which can never be supposed to be intended against one going to his parish church. And afterwards the Court declared that the action well lay, though perhaps it might have been otherwise had he been travelling for his pleasure. Comyns's Rep 345. pl. 175. C. B. Mich. 7 Geo. 1. Tashmaker v. Edmonton Hundred.

(D) What is a Robbery within the Statute. In respect of the *Place* where it is committed.

S. P. 2 Inst. 569.——A robbery done in a house is not properly a robbery, but rather a burglary; and robberies done in the highway only are relieved by the statute of Winton; per tot. Cur. And by Anderson every man is bound to guard his house at his peril for his own safety. 3 Le. 262. pl. 350. Mich. 32 Eliz. C. B. *Gardner v. Reading Hundred.*

1. IF one be robbed *in his house* it is not within the statute, be it in the day or in the night, and the hundred is not chargeable; for a man's house is his castle, and he must defend it at his peril. Per tot. Cur. 7 Rep. 6. a. Trin. 27 Eliz. *Sendill's case.*

cred. ——— Mo. 620. pl. 848. Trin. 42 Eliz. Anon. S. P. ——— S. P. And though a MS. of Justice Windham's case was shewn to the contrary, as 90 Eliz. Rot. 2415. where by the opinion of all the justices of C. B. it was held that for a robbery done in the night in a house, the hundred shall be charged, and Gawdy seeing the case, said, he well knew it to be the hand-writing of Justice Windham, yet he and all the Court held it to be no law. Cro. E. 753. pl. 13. Anon.

2. One *stopped an old way and laid out another in lieu thereof, much more beneficial, but without any other authority.* In an information thereupon it was insisted, that this new way is not such a way that the inhabitants are bound to watch there, or to make amends if any robbery be there committed. And this seems to be admitted by the Court, who gave rule for judgment accordingly. Cro. C. 266, 267. pl. 16. Mich. 8 Car. B. R. The King v. Ward and Lyme.

3. If a man be assaulted *in the highway in A. and carried to a house in B. and there robbed,* no action lies. Per Holt Ch. J. 2 Salk. 615. 8. C. — But 11 Mod. 12. Pasch. 1 Ann. B. R. Cooper v. Basingstoke Hundred. 7 Mod. 159. 160. S. C. 12, that Holt Ch. J. said,

that if he be *carried into an empty house and there robbed,* he would not deliver any opinion how that would be.

4. 6 Geo. 1. cap. 23. S. 8. Enacts, that *the streets of London and Westminster, and other cities, towns, and places, shall be deemed highways, within the act 4 and 5 Will. and Ma. cap. 8.*

(E) In what Place the Robbery shall be said to [249] be made.

1. **A** CARRIER, with money on a pack-horse, was *assaulted in one hundred, and the felons took his horse and pack, and led him into a wood in another hundred.* All the justices agreed, that this was a robbery in the first hundred; for upon the first taking he was robbed: *but if the carrier had led his horse himself,* then it should be adjudged to be in his own possession, and no robbery till he came into the 2d hundred. Goldsb. 86. pl. 11. Pasch. 30 Eliz. Anon.

So if robbers take a man in one hundred, and carry him into another, and rifle him there; this is no robbery in the 1st, but only in the 2d hundred, because he was always in possession. Per tot. Cur. Ibid. — S. C. cited by Holt Ch. J. in delivering the opinion of the Court, in case of Cooper v. Basingstoke Hundred. — See pl. 3.

2. If a man is *assaulted in one hundred, and he flies into another hundred, and he is instantly pursued by the rogues, and there robbed,* that hundred where the robbery was shall be only charged. Hutt. 125. Mich. 10 Car. Dean's case.

S. C. cited by Holt Ch. J. in delivering the judgment of the Court, in case of Cooper v. Basingstoke Hundred. — See pl. 3.

3. The plaintiff was *travelling in the highway within the hundred of M. and assaulted there by robbers, who took possession of him, and carried him to a coppice near the highway in the hundred of B. and there robbed him.* Holt Ch. J. declared that the unanimous opinion of the Court was, that the hundred of B. is chargeable; accord- 11 Mod. 8. pl. 3 Pasch. 1 Ann. S. C. accordingly. — 2 Salk. 614. pl. 4. S. C. accord.

ingly.—
 *Ibid. Holt Ch. J. said, that as to the assault being in the coppice, it was not necessary the robbery should be in the highway, to charge the hundred.
 able; for there was no robbery done till the plaintiff was in the hundred of B. for there the taking away was, which is the fact that makes the hundred chargeable; that the true reason why the hundred of B. is liable, is because they did not take the robbers within such a time, and not because they did not prevent the robbery: and the charge upon the hundred arises by their not taking the robbers, and not because a robbery was done. And here the hundred of M. was not bound to pursue and take the robbers, because the robbery was done in B. and not within their hundred, and nothing but the assault was done in M. 7 Mod. 157. Hill. 1 Ann. B. R. Cooper v. Hundred of Basingstoke.

But the Reporter adds thus, viz. And yet see Cro. C. + 267, where it is said, that the inhabitants are not bound to keep watch in a *new highway*, or to make amends for a robbery committed therein.

† The case is Cro. C. 266. pl. 16. Mich. 8 Car. B. R. The King v. Warpe and Lyme, which see at (D) pl. 2.—In the principal case of Cowper v. Basingstoke Hundred, an objection was made, how it would be, if one taken in the hundred of M. be carried into the hundred of B. into a mansion-house there, and robbed, or taken in the day-time in M. and carried into B. and robbed in the night. To which the Court said, that those cases were not provided for by the statute. 2 Salk. 615.—S. P. 11 Mod. 12. in S. C.—2 Ld. Raym. Rep. 826. S. C. and all the same points accordingly.—S. P. 7 Mod. 159, 160. in S. C.

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(F) *What the Party robbed ought to do.*

See (G) and (H)—The reasons why an oath is enjoined by the statute 27 Eliz. are, 1st, That the person robbed should enter into a recognizance to prosecute the robbers, if he knew them, or any of them. 2^{dly}, That the hundred

1. 27 Eliz. cap. 13. S. 11. **E**NACTS, that no person robbed shall have any benefit by the said statute, except he shall, with as much convenient speed as may be, give notice of the felony and robbery unto some of the inhabitants of some town, village, or hamlet, near the place where such robbery shall be committed; nor shall bring any action upon any of the statutes aforesaid, unless he shall within 20 days next before such action brought, be examined upon his oath, to be taken before some justice of peace of the county where the robbery was committed, inhabiting within the said hundred where the same was committed, or near unto the same, whether he doth * know the parties that committed the said robberies, or any of them; and if he shall confess he knows any of the felons, then before the action brought he shall enter into a recognizance before the said justice, effectually to prosecute them by indictment or otherwise, according to due course of law.

might be excused, upon the conviction of such person or persons. 3^{dly}, To prevent a robbery by fraud. Arg. 3 Mod. 288. Trin. 2 W. & M. B. R. in case of Ashcomb v. Elthorn Hundred.

If one that is robbed makes oath according to the statute, but does not bring his action within 20 days, he may make another oath, and the 2^d oath shall be good; for this is only a direction of the statute, and the statute being observed, it is sufficient. Resolved. 2 Sid. 45. Hill. 1657. Hall v. Sharrock Hundred.—And where an action against the hundred for a robbery, was discontinued, and a new one brought; the Court held the new action not well brought, because a new oath was not taken within 40 days before the last action brought. Sid. 139. pl. 12. Pasch. 15 Car. 2. B. R. Newman v. Inhabitants of Stafford.

It was said by some, that where an action lies not on 27 Eliz. it may be brought on the old statute; but others were against it: for the statute 27 Eliz. is in the negative; so as if the action lies not upon that, no action lies at all. Le. 823. Trin. 21 El. C. B. in case of Green v. the Hundred of Bucklechurch.

* Though the party robbed does know the robber, yet he shall have his action against the hundred, if he be not taken. Noy. 156. Lord Compton's case.—See (H) pl. 4.

2. The

2. The party robbed is not bound to *give notice* to the inhabitants, nor to direct them *which way the felons took their flight*, but the inhabitants are bound to pursue the felons without any such instruction. 4 Le. 18, 19. pl. 63. Mich. 32 Eliz. in C. B. *Shrewsbury and the Inhabitants of Ashton's case.* 2 Le. 174. cap. 112. Pasch. 29 Eliz. 8. C. accord- ingly. — After the person robbed has made hue and cry, though he does not follow the thieves any farther, yet his action remains agreed. 2 Le. 82. pl. 109. Trin. 28 Eliz. C. B. *Firrel v. the Hundred of B.*

3. The person robbed is not bound to *lend his horse* to pursue the thief, nor is he bound *himself to pursue* the thief presently. Noy. 155, 156. Lord Compton's case.

4. 8 Geo. 2. cap. 16. S. 1. Enacts, that no person shall maintain any action against any hundred, by virtue of the statutes 13 E. 1. St. 2. & 27 Eliz. cap. 13. unless he shall, besides the notice already required, with as much convenient speed as may be after any robbery on him committed, give notice thereof to one of the constables of the hundred, or to some constable, borsholder, headborough, or tithingman of some town, parish, or tithing near the place wherein such robbery shall happen, or shall leave notice in writing at the dwelling-house of such constable, &c. describing in such notice so far as the circumstances of the case will admit, the felons, and the time and place of the robbery; and also shall within 20 days cause notice to be given in the London Gazette, therein likewise describing the felons, and the time and place, together with the goods whereof he was robbed; and shall also, before action commenced, go before the chief clerk or secondary, or the filazer of the county wherein such robbery shall happen, or the clerk of the pleas of that court wherein such action is intended to be brought, or before the sheriff of the county, and enter into a bond to the high constable of the hundred, in the sum of 100l. with 2 sureties, to be approved of by such chief clerk, &c. with condition for securing to such high constable (who is required to enter an appearance, and defend such action) the payment of their costs, in case judgment shall be against such plaintiff.

SECT. 2. When such bond shall be entered into before the sheriff, such sheriff shall certify the same to the chief clerk or secondary, in the Court of King's Bench, or to the filazer of the county, in case the action be intended to be brought in C. B. or if in the Court of Exchequer, to the clerk of the Pleas, which certificate shall be delivered by the party robbed to the said chief clerk or secondary, or to such filazer, or clerk of the pleas, before any process shall issue, and such chief clerk, &c. shall not take any greater fee for making such bond, than 5s. above the stamp-duties, nor shall any sheriff take any greater fee for making, nor shall such chief clerk, &c. take any greater fee for filing such certificate, than 2s. 6d. and such chief clerk, &c. are to deliver over gratis all such bonds to the high constables.

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See (F) pl.
A, 2. 4.

(G) Notice. To whom, and when. And what shall be said sufficient Notice.

1. IF any other ask him what he ails, and he said that he was robbed, that is good notice. Noy 155. Lord Compton's case.

So where in the like case, the declaration was, that he gave notice at S. which was in another county, than where the robbery was done, and

2. The plaintiff counted that he was robbed in a highway in *divisis hundredorum*, and gave notice to the inhabitants of the hundred near the place where he was robbed. It was moved in arrest of judgment, that the declaration was not good, because he did not shew that the highway was within any hundred, and that it ought to be given to the inhabitants of both hundreds: sed non allocatur; for notice to either hundred is sufficient, and therefore it was adjudged for the plaintiff. Cro. J. 675. pl. 9. Mich. 21 Jac. Foster v. the Hundred of Spechor and Isleworth.

did not say it was *prope locum ubi roberia facta fuit*, but *prope hundredum*, which it was objected might be 10 miles from the place of the robbery, and that the statute mentions notice to be given to some of the inhabitants of some town, &c. near the place where such robbery shall be committed. But all the Court, upon view of a precedent in the New Book of Entries, fol. 348. conceived the declaration good enough, and that the hue and cry alleged, as made out of the county, was not material, it being near the place of the robbery, which being alleged to be near the division of the hundred, shall be intended near the division of the hundred where the robbery was committed, and not at the most remote place thereof, which would be a foreign intendment; wherefore it was adjudged for the plaintiff. Cro. C. 41. pl. 3. Mich. 2 Car. C. B. Tutter v. Inhabitants of Dacorum and Cashio.

If the hundred of A. and B. are adjoining, and the robbery is done in the utmost confines of A. and the party not knowing the hundreds, goes to B. and there gives notice, that is sufficient, because he is a stranger, and they ought to make hue and cry, east, west, north, and south; and so the hundred of A. shall know it. Noy. 155. Ld. Compton's case.—S. P. 3 Salk. 134. cites S. C. Henden Serjeant said, it had been adjudged that hue and cry made, and notice given to the inhabitants of the villages near adjoining to the place where the robbery was done, although it be out of the hundred and county, was good enough. But all the justices doubted thereof, if out of the county; but although it were in a place in another hundred, it were well enough; for by intendment the party robbed cannot know the division of the hundreds: but he ought at his peril to make it in a village near adjoining to the place where he was robbed; whereupon the judgment was affirmed. Crawley Just. said, that in C. B. in an action against the HUNDRED OF DACCORN, upon a special verdict, it was adjudged, that hue and cry made in the next vill adjoining, although it were in another county, was good. Cro. C. 379. pl. 5. Mich. 10 Car. B. R. Merrick v. Rapesgate Hundred.

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It was resolved, that notice given to the next village forward in the road, is good, altho' it be in another hundred, and although there was another village a little nearer, in the same hundred;

for it cannot be intended, that a stranger should have precise notice or knowledge of the villages in a strange place; so also P. 38. C. B. STINCHCOMBE v. THE HUNDRED OF BENHURST

in Berks, and refers to the statute 27 Eliz. cap. 13. Nov. 52. Odander v. the Hundred of Grodley in Surry.

4. Notice was given *in the hundred 5 miles from the place where the robbery was done.* And this was held good, because the party who is a stranger to the country, may not know the nearest place or town. March 10. pl. 28. Pasch. 15 Car. Sir John Compton's case.

5. Notice given *in the night of a robbery by the party robbed, with an intent that hue and cry should be made* after the felons, is good notice according to the statute, if it be given in convenient time after the robbery was done. By Roll Chief Justice; for it may be it could not be given sooner. 2 L. P. R. 240. Tit. Notice.

6. Notice given *to the parish where the robbery was done,* is good notice within the statute, which appoints that notice shall be given to the town, vill, or hundred. 2 Sid. 45. Hill. 1657. Hall v. Sharrock Hundred.

7. Notice of the robbery to the next vill *by one of the company,* has been held to be good notice. Arg. Show. 94. Pasch. 2 W. & M. in case of Ashcombe v. the Hundred of Spelholme.

(H) Oath and Examination.

1. **A** CARRIER's boy of 12 years old being only with the waggon, it was robbed in the absence of the carrier, and the boy made hue and cry, and came to a justice, and prayed to be examined, but he *refused to examine him.* The carrier himself would not go to be examined; thereupon the plaintiff, who delivered the money to the carrier, was examined, and brought his action on the statute against the hundred: But adjudged, it did not lie; for the boy who was robbed ought to have been examined, because he might know the robber; and not the plaintiff, whose money it was that was taken away. And it was moved by Periam and Anderson, that an * action framed on the statute of 27 Eliz. would lie against the justice who refused to examine the boy; but Windham J. doubted of it, because the justice of peace is a judge of record, and for such a thing as he doth as judge, no action lies. To which it was answered by Periam and Anderson, that *the examination, in such case, is not made by him as judge or justice of peace, but as a minister appointed for the examination by the statute, &c.* 1 Le. 323, 324. pl. 456. Trin. 31 Eliz. C. B. Green v. the Hundred of Bucklechurch.

See (F) pl. 1.
4. (P) pl. 4.
(T)

Cro. E.
142. pl. 8.
Green's case.
Trin. 31
Eliz. C.
B. seems to
be S. C. but
there it is re-
ported to be
brought by
the master;
and the opi-
nion of the
Court was,
that the
master
ought not
to be sworn
but the ser-
vant, and
that for the
reason here
mentioned;
and that the
intent of the
statute is,
that he that

hath had notice should be sworn; and thereupon the judgment was said. — 4 Le. 85. pl. 180. 30 Eliz. C. B. Green's case, seems to be S. C. but states it, that the plaintiff [meaning the master of the waggon] delivered the money to the servant, who was robbed; whereupon the master brought his action. It was moved, that the plaintiff, by the statute, was not † a per-
son able to bring this action, because he was not examined 30 days before the action brought. But the exception was disallowed; for the Court was clear of opinion, that the master should not be examined, but the servant. † [253]

* The only remedy, in case a justice of peace refuses to take the oath of the party robbed, is to bring an action of the case against him. Per Twissden J. Sid. 299. Trin. 16 Car. 2. B. R. in the case of the King v. Pawlin.

See Justices
of Peace (D)
pl. 3. and
the notes
there, S. C.
more at
large.

2. A person, who was *robbed in Berks, made oath before a justice of peace who inhabited within the hundred, but was then at his chambers in the Temple*, where he took the party's oath; and it was resolved, that the examination was good. Cro. C. 211. pl. 3. Pasch. 7 Car. B. R. *Hellier v. Benhurst Hundred.*

3. H. the plaintiff was *robbed of 403l. in Yorkshire, and made oath the next day before a justice of peace of the riding where the robbery was, and afterwards, within 20 days before the action brought, he made a second oath before the next justice of the riding*; and the jury found, that there were *no other justices in the county of York but of the 3 ridings, which are the north, east and west ridings, and which are as 3 several counties.* It was insisted, that this was not an oath made pursuant to the statute 27 Eliz. cap. 13. For though a riding shall be taken for a county in all beneficial statutes, as upon the statute of inrolments, which provides, that the deed shall be acknowledged before the clerk of the peace and one justice of the county where the lands lie, there a justice of the riding shall be sufficient, but it is not so in penal statutes as this is: but adjudged, that a justice of the riding in Yorkshire is a justice within the statute of 27 Eliz. For otherwise Yorkshire would be out of the provision of this statute, (though never intended to be so) because there are no justices there but of the ridings. 2 Sid. 44. Hill. 1657. *Hall v. the Hundred of Skarrock.*

S. C. cited 9
Mod. 287.
in S. C. of
Ashcomb
according-
ly, and that
the infor-
mation then
given by the
servant to
his master of
his know-
ledge of one
of the rob-
bers did not
oblige the

4. *J. and his wife and servant, travelling together, were all robbed of their money, and J. alone brought his action for the whole money against the hundred, as well for what was taken from his wife and servant as from his own person*; and he alone, without his wife or servant, made oath of the robbery: all which matter being found on a special verdict, it was adjudged, that his oath alone was sufficient within the intent of the statute; and although it was further found, that the *servant of J. who was robbed with his master, knew one of the robbers, (whose name was Lenoe) yet J. had his judgment*; quod nota. Carth. 146. in the case of *Ashcomb v. Elthorn Hundred*, cites it as adjudged. M. 1658. in the case of *Jones v. Bromley (hundred.)*

master; because the money shall be said to be in his possession, and not in the servant's, the master being then present; so the master is the person robbed within the meaning of the statute of Winton, though the money be in the hands of the servant.

5. B. coming to London with his servant, they left the usual great road between Brentford and Hammermith, and rode through a by lane near Serjeant Maynard's house to avoid the dust, and in that lane the *servant was robbed in the presence of his master of a box of lace, which was behind him on the back of the horse, to the value of 1200l. and B. the master alone made oath of the robbery, and brought the action*; and the ch. justice was of opinion, that the oath by the master alone was sufficient; because B. (the master) being present, the goods were in his possession; for the possession of the servant in the presence of his master is his (the master's) possession. And B. recovered 1000l. and had execution. Cited by Holt Ch. J. Carth. 147. Trin. 2 W. & M. B. R. in the case of *Ashcomb v. Elthorn Hundred*, as tried before him at the

the sittings in Westminster after last Easter Term between Bird and the Hundred of Ossulstone.

6. An *action* was brought by the master for the robbery of A. & B. his servants. The jury found the special matter, and that B. was a quaker* and would not take the oath, viz. that he knew none of the robbers. Et per Cur. 1st, the master may sue for the robbery of his servant, and the oath of the servant is sufficient. 2dly, The servant may also sue; for he had the possession. 3dly, If the servant be robbed in the presence of the master, the master must sue, and the oath of the master is sufficient, and cites Sty. 156. But if the servant was robbed out of the master's presence, the servant must swear. 4thly, As to B. who refused to swear, the hundred is not liable; for the statute of Eliz. was made in favour of the hundred, to prevent confederacy and combination between the thieves and the party robbed; and it was the master's folly to employ such a servant. 2 Salk. 613. pl. 1. Mich. 2 W. & M. B. R. Ascomb v. the Hundred of Spelholm.

Show. 94. S. C. adjournatur.— Ibid. 241. S. C. adjudged for the defendant as to the money in the quaker's custody, who would not be sworn—3 Mod. 287. S. C. by the name of Ashcomb v. Elthorn Hundred,

states it, that A. the servant sold fat cattle in Smithfield for his master for 106l. which money A. delivered in two bags sealed up to B. the quaker, who was robbed in company of A. and A. also was robbed of 12s. Per Cur. the action might have been well brought by A. alone, (but it is now too late, the year being expired) for where a servant is robbed of part of his master's goods and part of his own, he may have an action and recover judgment for the whole; and therefore at another day the master had judgment for 26s. only.—Carth. 145. S. C. states it, that A. sold beasts for 108l. and delivered 106l. to B. who was robbed thereof, and that A. himself was robbed of 40s. and that the master brought the action for 108l. and that it was adjudged by the whole Court for the plaintiff as to the 40s. taken from A. his servant, but against him as to the 106l. taken from B. who would not swear. And Holt Ch. declared, that A. the servant who delivered the 106l. to the quaker, and was present at the robbery, might well maintain the action in his own name for all the money, and that his own oath would be sufficient, and that he might declare that upon the taking away the money from the quaker, as his servant (who in truth was so for this time.) Nota, this advice of the ch. just. was observed in another action brought for the 106l. taken from B. the quaker.

7. In case upon the statute of Winton, the plaintiff declared in all points according to the statute, except only in shewing the oath before the justices of peace, which was, *that he was robbed by 4 persons to him unknown*. Now by the statute of 13 Eliz. it is required, that he shall make oath, that he did *not know the robbers, nor any of them*; and this matter being found specially, it was objected, that this oath was insufficient; for though he might not know all, yet *he might know one* of them. There being but 2 judges in court, they were divided; but there being no ch. just. adjournatur. 3 Lev. 328. Hill. 3 W. & M. in C. B. Pye v. (hundred of) Westbury.

12 Rep. 61. Mich. 6 Jac. Banks v. Burnham Hundred; the jury found, that the plaintiff was robbed, and that he made hue and cry, and that the plaintiff's oath was as

here; but whether the said oath taken was true according to the form and effect of the stat. 27 Eliz. and according to his count, (in which he set forth, that he swore he did not know the parties, or either of them) the jurors prayed the direction of the Court.—Noy. 21. in the case of Bateman v. the Hundred of S. P. and Walsley held the finding sufficient; but Warburton, Kingsmill, and Anderson, contra. And Walsley said, that when the plaintiff shewed that 3 men did rob him, and that he did not know them, that amounts to as much by common intendment as that he did not know any of them; then if it amounts to as much, it is sufficient enough. But Anderson referred to the statute, as to its being of the same sense, and that itself denotes a difference between the cases; for it prescribes, that he ought to shew that he did not know them, or any of them. Walsley replied, that that is only proper where there were 3 or more that robbed him; but where there are but 2 it is not apt nor proper speaking to say, them or any of them; but, or either of them. And in this case, it may be, it was the cunning of the justice that examined him, who peradventure lived within the said hundred that should be charged, to ease himself and his neighbours. But if the oath was in another manner, and that can be proved, although

although the justice certifies in another manner, yet the proof shall be allowed. To which Kingmill agreed. And the Court urged the defendants to give the plaintiff 40s. and so to make an end. Which motion both parties agreed to.

8. After a verdict for the plaintiff it was moved in arrest of judgment, that it appeared the oath was *taken before a justice of peace of the county, and not a justice dwelling in the hundred* according to the statute 27 Eliz. But the Court held it good notwithstanding; for the statute of Winton says no such thing, and the statute 27 Eliz. does it only by way of direction; and the declaration had been good though it had not set forth any oath taken before any justice at all. 2 Salk. 614. pl. 3. Mich. 6 W. 3. B. R. Dowley v. Hundred of Odiam.

[255] 9. In an action upon the statute of hue and cry, the *husband declared of a robbery committed on his wife*; and now upon evidence Judge Page declared his opinion to be, that the *husband ought to have went with his wife before the justice, and made oath of his having lost this money*; and thought this case distinguishable from that of a servant's being robbed of his master's money: there indeed he did allow the master need not make such oath; because the servant or master may either of them bring the action at their election; and the servant may declare of his own money being taken away, because of the special property that he had in it. However he allowed the plaintiff to proceed in his evidence, and afterwards a verdict was given for him, subject to the Court's opinion as to this point. Barnard. Rep. in B. R. 433. Hill. 4 Geo. 2. Coleman qui tam v. the Inhabitants of Loes.

(I) Robberies. Cautions for preventing them.

1. 13 Ed. 1. **E**NACTS, that *highways leading from one market-town to another, shall be enlarged, so that there be neither dike, tree, nor bush, where a man may lurk to do hurt, within 200 foot of the way; so that this statute does not extend to ashes or other great trees. And if any robbery be done through the default of the lord, in not avoiding such dike, underwood, or bushes, he shall be answerable for the felony; and if murder be done, shall pay a fine to the king. And the king willetb, that in his demesne lands and woods, the way shall be enlarged as aforesaid; and every lord shall remove his park-pales, wall, dike, and hedge, 200 feet from the highways, as aforesaid.*

2. 5 E. 3. cap. 14. Enacts, that *where any persons shall be suspected to be roberdsmen, waiters, or draw-latches, they shall be arrested by the constables, and be delivered to the bailiffs of the franchise or sheriff, to be imprisoned till the coming of the justices of goal-delivery.*

(K) Of Hue and Cry in general.

1. **H**UE and cry was at common law. Per Anderson Ch. J. Goldsb. 60. pl. 18. in Ashpool's case.

2. There be 2 kinds of hues and cries; the one by the common law, and the other by statute. Thereupon there are 2 pursuits; the one for the king, the other for the party by private suit. 3 Inst. 116. cap. 52.

3. Hue and cry by the common law, or for the king, is when any felony is committed, or any person grievously and dangerously wounded, or any person assaulted and offered to be robbed either in the day or night, the party grieved, or any other, may resort to the constable of the town, and acquaint him with the causes, describing the party, and telling which way the offender is gone, and require him to raise hue and cry. And the duty of the constable is to raise the power of the town, as well in the night as in the day, for the prosecution of the offender; and if he be not found there, to give the next constable warning, and be the next, until the offender be found; and this was the law before the Conquest. 3 Inst. 116.

(L) Hue and Cry. Inforced and levied, how.

[256]
See (M) pl.
3. S. 10.

1. 13 Ed. 1. stat. 2. **E**NACTS, that proclamation shall be made in all counties, hundreds, markets, fairs, and other places where there is a great resort of people, that immediately after any robbery or felony committed, * fresh suit shall be made from town, and from county to county.

The effect of the statute of Winchester, made at a parliament holden in

13 E. 1. is this, that from thenceforth every country should be so well kept, that immediately upon such robberies and felonies committed, fresh suit should be made, &c. 2 Inst. 569.— See (C) & (D)

* In the case of Armstrong v. Lisle. Mich. 8 W. 3. Keeling's Rep. 96. it is said, that great question has been made, what should be accounted fresh suit, and cites St. Pl. Cor. 165, 166. where, upon consideration of all the books, it is settled, that it is not capable of any certain definition, but must be determined by the discretion of the justices.

2. 13 E 1. cap. 6. The sheriffs and bailiffs of franchises are required to take heed, that they follow the cry with the county, and keep horses and arms for that purpose, as they are bound; and in default thereof, shall be presented by the constables to the justices assigned, and by them to the king, who will provide a remedy.

3. 28 Ed. 1. cap. 17. Enacts, that the statute of Winchester shall be sent into every county, to be published four times a year, and kept in every point as strictly as the two great charters, upon the pains therein limited; and the knights of the shires for redressing things done against the said great charters, shall be charged therewith.

4. 28 E. 3. cap. 11. The statute of Winchester for making of fresh suit, and hue and cry, is confirmed.

5. 7 R. 2. cap. 6. The said statute of Winchester is again confirmed, and required to be proclaimed by the sheriff in person, four times

times a year, in every hundred of his county; and by his bailiff; in every market-town, as well within liberties as without.

(M) *Punishment for not pursuing, concealing, or not arresting Felons.*

This statute is in affirmance of the common law. 3 Inst. 117.

1. 3 Ed. 1. cap. 9. **E**NACTS, that all men shall be ready and *West. 1.* apparelled at the summons of the sheriff, and at the cry of the county * to sue and arrest felons, as well within + franchise as without, upon pain of making ‡ grievous fine to the king.

2 Inst. 172. Lord Coke cites several ancient authors to prove that hue and cry was before the making this statute. — And Ibid. 173. he says that hue, and cry, is all one, and in ancient records they are called hutesum & clamor, and here cry is used for both. And this hue and cry is used for both. And this hue and cry may be by *born, and by voice.* 2 Inst. 173.

* By these words it is holden, that there *must be a felony done*, or else the arresting of the party, though it be done upon hue and cry, is unlawful, because it wants a foundation; but if a felony be done, and the hue and cry is against one that is neither indicted, nor of ill fame, nor suspicious, nor unknown, yet the arrest of him is lawful, though he be not guilty; for the hue and cry of itself is cause sufficient, where there is a foundation of a felony committed. And he that *levies hue and cry upon another without cause*, shall be attached and punished for disturbance of the king's peace. 2 Inst. 173.

+ This was not intended of sanctuaries, but of lords and others, that had franchises of *in-fangthesc, out-fangthesc, and the like.* 2 Inst. 173.

‡ That is, at the king's suit they shall be fined grievously, and imprisoned. 2 Inst. 173.

[257] *And if the lord of the franchise make default, the king shall * seize the same; and if the bailiff make default, he shall suffer one year's imprisonment, and pay a grievous fine; and if he have not wherewithal, he shall suffer two years imprisonment.*

* It seems hereby, that the franchise is lost for ever; for the words be, that the king shall take to himself the franchise, (viz. as forfeited.) 2 Inst. 173.

Note here 3 things are rehearsed, as causes wherefore sheriffs and other the king's officers and ministers of justice do neglect their duties. 1st. By *prayer*, (by letters, messages, or word of mouth.) 2. *Reward*, (sordid bribery.) 3. *Fear*, (the basest, and yet the most forcible of all affections.) 4. *Sanguine*, any manner of *consanguinity or affinity*; under which word (affinity) in this act is included as well nearness of blood, as alliance by marriage. Lastly, *favour*, in respect of friendly affection; for men may be corrupted not only by reward, but in respect of the other 4 also, all tending to one and the same end, to suppress truth; as here to conceal, consent, or procure to conceal the felonies done within their several precincts or bailiwicks. 2 Inst. 173.

And if any sheriff, coroner, or bailiff of a franchise, for fear or favour, shall conceal, consent, or procure to conceal felonies done in their liberties, or shall neglect to arrest felons, or otherwise will not do their office, in favour of such offenders, they shall suffer one year's imprisonment, and pay a grievous fine, if they have wherewithal; and if not, shall suffer 3 years imprisonment.

2. If a man be *robbed in Middlesex*, and makes *hue and cry freshly in Essex*, if the vills adjoining do not do according to the statute of Winton, the party shall have writ of debt in the one county or the other; per Finch. quod non negatur. Br. Dette, pl. 103. cites 15 E. 4. 19.

3. 27 Eliz. cap. 13. S. 2. Recites the statute of Winchester, and 28 Ed. 3. And enacts, that the inhabitants of every hundred who shall make default in pursuing felons, and fresh suit, after hue and cry made, shall forfeit one half of the damages to be recovered of the hundred

hundred where any robbery or felony shall be committed, to be recovered by action of debt, bill, plaint, or information, in the courts of Westminster, in the name of the clerk of the peace of every county, where such robbery and recovery by the party robbed shall be, without naming the Christian or surname of the said clerk of the peace, which moiety so recovered shall be to the use of the inhabitants of the hundred, where such robbery or felony shall be committed.

S. 3. And in case such clerk of the peace shall die, or be removed, no action, &c. so commenced shall be discontinued, but may be prosecuted by the succeeding clerk of the peace, as the former clerk might have done.

S. 7. And the like taxation, assessment, distress, and payment, [as mentioned at (W) pl. 2.] shall be in every hundred, where default was made of fresh suit, for the benefit of the inhabitants of such hundred, where damages shall be recovered against them, for the payment of the moiety of the money recovered against any hundred, where a robbery shall be committed.

S. 10. And no hue and cry, or pursuit to be made by any county or hundred, shall be taken to be a lawful hue and cry, or pursuit, unless the same be made by horsemen and footmen.

4. They which levy not hue and cry, or pursue not upon hue and cry, shall be punished by fine and imprisonment. Also, if a man be present, when a man is murdered or robbed, and does not endeavour to attach the offender, nor levy hue and cry, he shall be fined and imprisoned. 3 Inst. 117. cap. 52.

5. It is an article of the leet to enquire of hues and cries levied, and not pursued. 3 Inst. 118. cap. 52.

6. By 8 Geo. 2. cap. 16. sect. 11. Every constable, borsholder, beadborough, or tithingman, to whom notice shall be given, and every constable of the hundred, and every constable, &c. within the hundred or the franchises, within the precinct thereof wherein such robbery shall happen, as soon as the same shall come to his knowledge, shall with the utmost expedition make fresh suit, and hue and cry after the felons; and if any constable, &c. shall offend in the premises, he shall forfeit 5l.

(N) Encouragement or Rewards for apprehending [258] Robbers.

1. 4 & 5 W. & M. ENACTS, that whosoever shall apprehend a highwayman and prosecute him till he be convicted of any robbery, committed in or upon any highway, passage, field, or open place, shall receive of the sheriff of the county, for every offender so convicted the sum of 40l. within one month after such conviction, and demand thereof by tendering a certificate to the sheriff, under the hand of the judge before whom such conviction is, that such felon was taken by the person or persons claiming the said reward. And the said judge shall by his certificate direct the said reward to be paid to and amongst the persons claiming the same, in such shares and proportions as he shall think fit. And the sheriff making default in payment of such sum after demand, and certificate brought as aforesaid, shall forfeit to

the persons, to whom it is due, double the sum he ought to have paid them, to be recovered by action of debt, &c. in any of the courts at Westminster, with treble costs.

S. 3. And in case any person shall be killed in apprehending or pursuing such robber, then the executors or administrators of the person killed, upon a certificate thereof from the judge of assize of the county where the fact was done, or the 2 next justices of peace, shall receive 40*l.* of the sheriff on pain of forfeiting double the said sum to be recovered as aforesaid, with treble costs.

S. 4. And the sheriffs are authorised to deduct the said sum of 40*l.* so paid in their accounts.

S. 5. And if the sheriff have not money in his hands to reimburse himself he shall be repaid it by the treasurer upon certificate from the clerk of the pipe.

S. 6. And the person apprehending such robber, shall have as a farther reward his horse, furniture, arms, money, or other goods, which shall be taken with him; king's title, or that of any other lord of the manor, &c. or of him who let or lent the same to such robber notwithstanding.

S. 7. Provided that this clause shall not extinguish the right of any person from whom the same were before feloniously taken.

S. 8. And if any person who shall commit any robbery (being out of prison) shall discover 2 or more persons who have committed any robbery, so as they may be convicted, he shall have their majesty's pardon for all robberies committed before that time, which shall also be a good bar to any appeal.

2. By 6 Geo. 1. cap. 23. S. 8. Certificates upon convictions for robbery shall be signed and paid without fee, excepting 5*s.* for writing; and that as well where the offenders plead guilty, as where they are convicted on evidence: and if any person under pretence of signing any such certificate, or of payment of the money, shall take any fee other than as aforesaid, such offender shall forfeit 40*l.* to be recovered to the use of the person intitled to the certificate.

3. By 8 Geo. 2. cap. 16. S. 9. Any person who shall apprehend such felons within the time herein limited, whereby the hundred has been discharged, shall upon proof upon oath made before such 2 justices be intitled to 10*l.* (which shall be raised upon the hundred by a taxation) and such sum of 10*l.* shall be paid unto such 2 justices within 10 days after the same shall be collected; and such justices shall pay over the said sum to such persons, in such shares as the said justices shall think reasonable, provided that such person shall not be thereby incapable to be a witness in such action.

[259] S. 10. The justices, by whom such taxations shall be made, shall appoint some reasonable time, within which such taxations shall be levied, which time shall not exceed 30 days; and if any officers, who are to levy such taxations, shall neglect to levy the same, or shall neglect to pay over the money to the sheriff and justices, such officer shall for every neglect forfeit double the sum.

(O) *Hundred discharged. What shall be a Taking within the Statute sufficient to discharge the Hundred.*

1. **A.** IS robbed, whereupon 2 are taken upon suspicion, and after are acquitted, yet the hundred stands chargeable. D. 370. a. Marg. pl. 59. cites Mich. 23 Eliz. Per Periam.

2. A. is robbed by 8, of whom 4 are taken by the hue and cry, yet the hundred is chargeable for the escape of the others. D. 370. a. Marg. pl. 59. cites Pach. 24 Eliz. Per Mead and Periam.

But by 27 Eliz. cap. 13. S. 8.

It is provided, that

wherever any one felon shall be apprehended by pursuit made according to this or any former laws, that then no hundred or franchise shall incur any pain or forfeiture by this or the said former statutes, although the rest of the felons shall happen to escape.——7 Rep. 7. 8. Trin. 29 Eliz. C. B. in case of Milbourn v. Dunmow Hundred.

3. If a man is robbed in one hundred, and he pursues the felons into another county, and there one of the felons is taken, though the hundred where he was robbed do nothing, they shall not be charged. For per Cur. if a stranger makes hue and cry so that the felons are taken, the hundred is discharged. Goldsb. 55. pl. 9. Trin. 29 Eliz. Comford v. the Hundred of Offley.

4. In action upon the statute of Winton the jury found notice according to the statutes, and that none of the robbers were taken within 40 days, but that after 50 days after the robbery was done 2 of the robbers were taken; the question was, whether by taking any of the robbers after the robbery or before the verdict or judgment, the hundred is discharged. The Court agreed, 1st, That at common law the hundred was not discharged unless all were taken. 2dly, That it was lately held, that the hundred is discharged by taking any of the robbers after the 40 days though all are not taken, and that it was in a case where robbers were taken and condemned at the Old-Bailey. But the Court now doubted of it. Sid. 11. pl. 8. Mich. 12 Car. 2. C..B. Baskervill v. Agbridge Hundred.

5. In action upon the statute of Winchester, the defendant pleads quod ceperunt quendam Richard Dudley, being one of the persons who robbed the plaintiff, and upon issue joined, the jury found, that the said Richard Dudley being accidentally, or upon some other occasion, in the presence of Sir Philip Howard, a justice of peace of the same county was there charged by Sir J. A. one of the hundred to be one of the robbers; and that the said Sir Philip Howard did undertake for him, that he should appear at the next sessions. That the said Dudley at the next sessions did come into the sessions-yard, but did not render himself up to the Court: and whether he the said Dudley, being in the presence of the justice of peace, and charged as aforesaid, was a taking within the statute of 27 Eliz. cap. 13. was the question by the jury. And it was adjudged for the defendant, that this charging of the robber was a taking

2 Lev. 4. S. C. accordingly, and says that Sir J. A. desired Sir P. H. to commit Dudley, whereupon Sir P. H. undertook for his appearance.——Vent. 118. S. C. held that the charging him in the presence of

a justice of taking within the statute. Raym. 221. Hill. 24 & 25 Car. 2.
peace was B. R. Metwyn v. the Hundred of Iffleworth.
clearly a

taking; for being in the presence, which the law construes to be under the power or custody of the magistrate, it would have been vain and impertinent to have laid hold of him; and it shall be intended, that this was upon fresh pursuit; for when the verdict refers one special point to the judgment of the Court, all other matters shall be intended. And the Ch. J. said, that if the hue and cry was made towards one part of the county, and an inhabitant of the hundred apprehended one of the robbers within another, yet this was a taking within the statute.

[260] 6. By 8 Geo. 2. cap. 16. sect. 3. No hundred shall be chargeable, if one of the felons be apprehended within 40 days next after notice in the Gazette.

Sec (H)

(P) Action. Brought by whom.

Three men were robbed, and all joined in an action against the hundred. 2 Le. 12. pl. 19. 19 Eliz. C. B. Anon.

1. TWO persons were joint owners of a sum of money, and were robbed thereof, and they joined in an action against the inhabitants of the said hundred; and by the opinion of the Court they might well join in the action, but not if the sums were several and several properties. D. 370. a. pl. 59. Pasch. 22 Eliz. Winterstoke Hundred's case.

2 Le. 82. pl. 109. Trin. 28 Eliz. C. B. S. C. by the name of Firrel v. the hundred of B. And exception being taken, because it was his master's money, it was not allowed; for the plaintiff is accountable to his master for the money.

2. If a servant is robbed of the master's money, the servant may sue, the hundred upon the statute of Winton. Goldsb. 24. pl. 3. Trin. 28 Eliz. Tirrel's case.

In an action against the hundred for a robbery, the plaintiff declared he was possessed ut de bonis suis propriis, &c. 3. Action was brought upon the stat. of hue and cry by the servant who was robbed, in his own name, and part of the goods were his master's and part his own proper goods, and found guilty as to his own goods, and a special verdict as to the goods of his master; and judgment for the plaintiff. Brownl. 155. Trin. 8 Jac. Rot. 534. Needham v. the Inhabitants of Stoke Hundred.

The jury found, that the plaintiff was a servant, and was robbed of 30l. his master's money, and of 20s. his own money. The Court held the action well brought by the servant; for the money is his, and he is possessed ut de bonis suis propriis against all, and in respect of all but him who hath the very right. 2 Salk. 613. pl. 2. Pasch. 5 & 6 W. & M. B. R. Combs v. the Hundred of Bradley.—Comb. 263. S. C. by the name of Combs v. Brackley Hundred, accordingly.—4 Mod. 308. Trin. 6 W. & M. in B. R. S. C. argued, et adjournatur But it is added, that afterwards the plaintiff had judgment.—12 Mod. 54. S. C. but shortly reported.

Cro.C. 336. pl. 28. Mich. 9 Car. B. R. S. P. and seems to be S. C. affirmed on error brought.

4. The servant was robbed, and he made oath of the robbery within 20 days before the action brought, and that he did not know any of the robbers, &c. The master brought the action. After verdict for the plaintiff, it was moved in arrest of judgment, that the action would not lie; because the master, who brought the action, was not sworn, that he did not know any of the robbers. But resolved per Cur. that the action is well brought by the master, and that the servant's oath is sufficient; for it lies properly in his knowledge, that he was robbed and did not know any of

of the robbers, and what the master knows is only by the report of his servant; and if he, and not the master, should bring the action, then the servant might * release or compound, or discontinue the suit, and so the master should lose by his falsehood; and adjudged for the plaintiff. Cro. Car. 37. pl. 2. Trin. 2 Car. C. B. Raymond v. the Hundred of Oking.

* In an action brought by a servant who was robbed of

his master's money, it was objected, that the servant might release, and so prejudice his master; but the Court said, he shall not release. 12 Mod. 54. Trin. 6 W. & M. in B. R. Combs v. Bradley Hundred.

5. A. riding post, gave his portmanteau to the post-boy to carry it, in which was money; a robber took the money out of the portmanteau, one end of which A. laid his hand upon. The question was, whether A. might have action for this robbery? Roll Ch. J. said, there is no question but this was a robbery of A. and it is all one as where my servant is robbed in my presence, and and there the goods shall be said in my possession, and so it is here; and ordered judgment to be entered nisi. Sty. 318. Hill. 1651. Crosthwait v. Lowdon Hundred.

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6. If a man delivers money, &c. to a carrier, to carry to such a vill, who is robbed, and makes oath thereof according to the statute, the owner who hath the real property, or the carrier who hath the possessory property, may either of them bring the action against the hundred. 2 Sid. 45. Hill. 1657. Hall v. the Hundred of Skarrock.

(Q) Actions. Within what Time to be brought.

1. 27 Eliz. cap. 13. **E**NACTS, that no person or persons hereafter robbed shall take any benefit by virtue of any the * said former statutes, to charge any hundred where any such robbery shall be committed, except he or they so robbed shall commence his or their suit or action within one year next after such robbery so to be committed.

* 13 E. 1. 1, & 2. called the statute of Winchester, & 28 E. 3. 11. — A robbery was committed the

9th of Octob. 13 Jac. and a writ upon this statute was brought the 9th of Octob. 14 Jac. After verdict for the plaintiff, it was moved in arrest of judgment, that the writ was not brought within the year after the robbery committed. Warburton J. held, that the day of the date should not be counted any part of the year. But Winch. J. & Hobert Ch. J. contra, and that the plaintiff might without doubt have brought his action the very day of the robbery; and that though the party robbed deserved pity and relief, yet, against the hundreds, which are very innocent persons, it is a very penal law; and so the plaintiff could not have his judgment. Hob. 139, 140. Hill. 14 Jac. Norris v. the Hundred of Gawtry. — Brownl. 156. S. C. The Court held it a good exception. — Mo. 878. pl. 1233. S. C. and that a fraction of a day, in such case, shall be allowed by dividing of the time in the day, (viz.) the robbery committed the 9th of Octob. 13 Jac. Post meridiem, is within the year to bring the writ the 9th of Octob. 14 Jac. in the morning.

A. was robbed on the 10th of June, 1717, and sued out an original. The hundred appeared, and A. declared, and after dropped his action. On the 5th of June following A. gave instructions for a new original to the curfitor, but he did not make it out till the 10th of June, 1718, which by antedating bore test on the 5th of June, 1718, so that the year was expired when it passed the great seal. This, upon a reference to the curfitors, being certified by them to be agreeable to the constant practice of their office, was held good per Ld. C. Parker. Wms's Rep. 437. Trin. 1718. Price v. Chewton Hundred in Com. Somerset.

In action on the statute, and verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was above a year after the robbery; but the Court held it well enough if the original

original be brought within the year; for perhaps the defendant has stood out process; and so may keep the plaintiff above a year before he can declare against him. Comb. 160, 161. Mich. 1 W. & M. B. R. Anon.

2. But by 8 Geo. 2. 16. S. 14. *No action, suit, or information shall be brought or exhibited, [upon this or the statute of Winton, or the 27 Eliz.] but within 6 months after the matter or thing done.*

(R) Proceedings.

1. **A**N action upon the statute of hue and cry against the inhabitants of any hundred *will never lie by bill, but must be sued by writ*; because it is brought against inhabitants, which are a multitude, who cannot be in custodia marescalli, as a private person may. This was said by Fell, an attorney of B. R. to have been so adjudged in that Court. Goldb. 148. pl. 69. Hill. 43 Eliz. Anon.

[262] 2. The plaintiff had not a writ, or a true copy of it, to *shew when the action was commenced*, which was necessary, so that it may appear if the examination before the justice of peace was taken in due time, as the statute appoints; and it was not admitted to be proved by oath, because these are matters of record: and so the action was stayed. Clayt. 122. pl. 216. Lent Assises, 1647. before Germin J.

3. Upon a trial in this case the party *must file his original, and be sure to have a true copy thereof, and witnesses to prove it*, whereby it may appear to the Court to be according as the statute directs. *He must also have the affidavit, and a witness to prove the taking of it.* 2 L. P. R. Tit. Hue and Cry.

4. By 8 Geo. 2. cap. 16. sect. 4. *No process for appearance shall be served on any inhabitant, save only upon the high constable of the hundred, who is required to cause publick notice to be given in one of the principal market-towns on the next market-day; or if there be no market-town, then in some parish-church immediately after divine service on the Sunday next after his being served with process, and he is to enter an appearance in the action, and defend the same as he shall be advised; and in case the plaintiff recovers, no process of execution shall be served on any particular inhabitant, but the sheriff shall, upon receipt of any execution, cause the same to be shewn to 2 justices of peace (one of the quorum) residing within the hundred, or near the same, who shall cause such assessment to be made and levied, as by the statute 27 Eliz. cap. 13. in which assessment there shall be included, over and above the costs and damages recovered by the plaintiff, all necessary expences which any high constable has been at in having defended such action, claim being made thereto by such high constable before the justices, upon notice given him by the justices; and the money so levied shall be paid over (by such officers as by the statute 27 Eliz. are to levy the same) within 10 days to the sheriff of the county, to the use of the plaintiff, for so much as the costs*

costs and damages by him recovered shall amount to, and to the use of the high constable for so much as his expences shall amount to, of which the high constable shall give in an account, and make proof upon oath to the satisfaction of the justices before any taxation shall be made for reimbursing such high constable, and shall have no further allowance towards paying an attorney than what such attorney's bill shall be taxed at.

SECT. 5. The money, which shall be paid over to the sheriff, shall (upon request) be by him paid over to the parties intitled without deduction.

SECT. 6. No sheriff shall be called upon to return such writ of execution until 60 days after the writ shall be delivered to the sheriff, who is to endorse the day on which he received the same.

(S) Declaration, Pleadings, and Verdict.

1. **I**N action against the hundred of W. the defendants pleaded, *that they pursued the felons through 3 towns in that hundred, to the town of C. which is in the hundred next adjoining, judgment sit actio, &c.* The opinion of the Court without argument was, that this is no excuse within the intent of the statute of Winton, without apprehending the criminals, or the defendants describing their names, so that they may be indicted and outlawed. Dyer, 370. a. pl. 59. Pasch. 22 Eliz. Winterstoke Hundred's case. The hundred's doing their best endeavours to apprehend the felons, is not sufficient to excuse them from making satisfaction to the party robbed. 4 Le. 18. pl. 63. Mich. 32 Eliz. C. B. Shrewsbury v. Inhabitants of Ashton.——2 Le. 174. pl. 212. Pasch. 29 Eliz. S. C. accordingly.

2. The plaintiff declared that the robbery was done in the parish of D. in the hundred of A. The jury found, that the *place where the robbery was done, was a lane within the said hundred, and that the one side of the said lane was within the parish of S. and the other side within the said parish of D.* and that the robbery was done on the side of the said lane, which was in the parish of S. And prayed the opinion of the Court upon the matter: and the whole Court was clear of opinion, that notwithstanding the exception, the plaintiff should have judgment; for here is the right hundred which ought to be charged, and the mistaking of the parish was not to the purpose. 4 Le. 19. pl. 63. Shrewsbury and the Inhabitants of Ashton's case. [263]

2 Le. 174. pl. 212. Pasch. 29 Eliz. C. B. S. C. accordingly.——So where the jury in such a case found, that the party was robbed the day and year specified in the declaration, but not in the place or parish therein alleged, but that both the parishes were in the same hundred. It was held clearly, that the plaintiff shall have judgment; for it is not material in what parish he was robbed, so it was in the same hundred. Goldsb. 58. pl. 16. Trin. 29 Eliz. Burnell's case.——Ow. 7. S. C. by the name of Bucknell's case accordingly.

3. The action was upon the statute of Winchester, for a robbery against the inhabitants of the hundred of Staincross and Ewclif, which is a *double hundred* there, as Agbrig and Morley, Stafford and Tickle are; and because some doubt was, *if the hundred in question was one or two hundreds,* * but commonly it is taken but one in all assessments, &c. and if two, it would alter the *case* *The words of the book are as here.

case much; for then a more distinct place for the robbery must be, &c. to discern in which of the hundreds this robbery was committed, &c. *a juror was withdrawn by consent.* Clayt. 117. pl. 205. Ashton's case.

Noy. 125. S. C. resolved that the contra formam statuti shall refer to 13 E. 1. and that 27 Eliz. is only restrictive, and for the better direction in such cases.—Cro. J. 187. pl. 9. S. C. says the Court at first doubted, and after diverse precedents shewn to them, some where of

4. In action upon the statute of Winton, 13 Ed. 1. the plaintiff shewed he had performed every thing required by the statute 27 Eliz. and concluded *contra formam statuti prædicti*; after a verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was not good, because having declared on two statutes, he ought to have concluded *contra formam statutorum*: sed non allecatur; for per tot. Cur. in this case the action is grounded only on the statute of Winton, and the statute 27 Eliz. is rather an obstruction to the action than otherwise, because where the plaintiff might have brought an action generally against the hundred before 27 Eliz. now certain circumstances are to be performed by him, before he can charge the hundred, viz. he must swear the robbery, and that he knows none of the felons, &c. and so that statute was made in case of the hundred, and therefore *contra formam statuti* must necessarily refer to the statute of Winton, which gave the suit. And per Cur. if he had concluded *contra formam statutorum*, it had been ill, because the 27 Eliz. enables not the party to sue. Yelv. 116. Mich. 5 Jac. B. R. Andrews v. Lewkenor Hundred.

were *contra formam statutorum prædictorum*, they held the best form to be *statuti prædicti*. [And that for the reasons mentioned in Yelverton] —S. P. For the action is grounded solely upon the statute of Winton, and that of Eliz. is but directory. Comb. 160, 161. Mich. 1 W. & M. in B. R. Anon.—S. P. Hill. 11 Geo. 2. B. R. Merrick v. the Hundred of Ossulton.

2 Bulst. 255. S. C. by the name of Witherley Hundred's case, says, that the *quoad captionem & spoliationem* shall be intended that the hundred was guilty as to the charge, and not as to spoiling, and that judgment was affirmed.—

5. The plaintiff declared, that he was robbed of 80l. in money, and a cloak, &c. Upon not guilty pleaded, the jury found *quod quoad captionem, asportationem & spoliationem* of the 80l. that the defendants were guilty, and assessed damages to 90l. and as to the rest, not guilty: upon a writ of error brought, the error assigned was, that the hundred could not be guilty de captione, &c. for they can be only guilty for not taking of the robbers, or not answering the said money: sed non allocatur; for they may be found guilty, according to the declaration, for so much as was proved whereof the plaintiff was robbed; and though he * declared of diverse things which perhaps he could not prove he was robbed of, yet for so much as he proved, it is well enough. And the finding they † were guilty of the caption, &c. means only that the plaintiff was robbed of so much, and that defendants had not made him amends. And judgment was affirmed. Cro. J. 348. Trin. 12 Jac. B. R. Oldfield v. Witherby Hundred in Kent.

* See pl. 10. infra. Pinkney v. East Hundred, S. P. adjudged.

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Hob. 246. pl. 310. S. C. by the name of Constable's case secondly; and says that it

6. An action was brought against the half-hundred of Waltham, and verdict for the plaintiff. It was moved in arrest of judgment, that the action would not lie, because not brought against the whole hundred; but it was answered, that the half-hundred is a hundred by itself. The Court held, that it ought to have been brought against

against them thus, (viz.) *inhabitants in bundredo de Waltham, called the half-hundred of Waltham*: but the writ was held good; for it shall be so intended to be brought against the persons inhabiting in the half-hundred of W. And judgment for the plaintiff. Brownl. 156. Trin. 15 Jac. Constable v. Hundred of Waltham.

hath indeed an hundred court by itself; and otherwise it should have been so pleaded

or given in evidence.

7. The plaintiff in his declaration had *mistaken* to alledge *the very day of the robbery*; for he shewed the robbery to be committed in October, when in truth it was committed in September; and the Court was moved, that the *record* which was taken out for trial, but never put in, might be *amended*; for the notice given to the hundred, as the record is, would appear to be before the robbery; and they granted that it should be amended. Brownl. 156. Trin. 15 Jac. Camblyn v. Tendring Hundred.

8. *Trespass upon the case* was brought against the hundred of Crondon in Hampshire, upon the statute of Winchester, by one that was robbed within the hundred; and upon the trial a verdict passed for the plaintiff. *It was moved* on the behalf of the hundred, in arrest of judgment, 1st, *That the plaintiff had mistaken his action*; for whereas he has brought a general action of trespass upon the case, he ought to have brought an action upon the statute. 2dly, *He declares that he took his oath before J. S. a justice of peace in the county*, whereas it should be *for the county*. 3dly, *He has not expressed that he took his oath before a justice assigned to keep the peace*. 4thly, *There is no issue joined*. 5thly, *He says that he took his oath 20 days*, but does not say *next before*, as the statute directs. Windham on the other side answered to the 1st exception, that it is usual of latter times to declare in an action upon the case generally. To the 2d he said it is no exception; for a justice of peace is not an officer affixed to a place. Twisden answered, that it does not appear that you took your oath 20 days before your original sued out. Glyn Ch. J. said, that appears well enough upon the record; but the writ here is an action upon the case generally, and yet he declares in an action upon the case upon the statute, which is not all one, and so the declaration varies from the writ; for an action upon the case upon the statute, is an extraordinary action upon the case; but he believed it was well enough notwithstanding, it being after a verdict, and not being a material variance, but a bare recital; therefore let the plaintiff take his judgment. Styl. 472. Mich. 1655. . . . v. Crondon Hundred.

9. It was said by Wild J. Freem. Rep. 19. pl. 20. Mich. 1671. in C. B. in case of Browning v. Halford, that he knew a great cause miscarry in B. R. upon the statute of hue and cry, for saying *tent. apud Westminster* instead of *Winchester*.

10. In an action by a common carrier, he declared that certain malefactors, (viz.) 3 men to him unknown, 10 Oct. 22 Car. in the highway, within the hundred of E. in the parish of T. in the county of R. with force and arms *assaulted him, &c 29l. 10s. in pecuniis*

pecuniis numeratis de denariis ipsius (the plaintiff) propriis then and there found, *feloniously did take from him, ac diversa bona & catalla in custodia sua existen' ad valenciā 39l. &c.* adtunc & ibidem similiter invent. de eodem, the plaintiff, did take and carry away, but did not shew the particulars of the goods, nor that they were his own goods. Upon a demurrer, Saunders (the plaintiff's counsel) admitted the declaration ill, for not laying the goods to be the plaintiff's, yet he insisted it was good and sufficient for the money, and so he ought to have judgment for what is good; for *this action is in nature of trespass wherein damages are recoverable, and therefore dividable*, and so ought to have judgment for what is well laid, and be barred for the residue. And the whole Court were clear of that opinion, and gave judgment for the plaintiff, and he entered a remittit damna for the goods. 2 Saund. 374. 379. Trin. 23 Car. 2. Pinkney v. East Hundred in Rutlandshire.

Comb. 150. S. C. says that the 1st exception was, that the declaration was of a robbery near the highway. 2dly, That it is said apud quendam locum

11. In an action against the hundred for a robbery at a certain place near Fair Mile Gate in the parish of C. after a verdict for the plaintiff, it was moved in arrest of judgment, that it did not appear, 1st, *That the parish mentioned in the declaration was within the hundred.* 2dly, *Nor that the robbery was * committed in the highway, nor that it was done in the day-time.* But the exceptions were disallowed; for being after a verdict, the Court will suppose that evidence was given of these matters at the trial. 3 Mod. 258. Mich. 1 W. & M. in B. R. Young v. Totnam Inhabitants.

prope Fair Mile Gate infra hundredum prædictum, and that hundredum prædictum refers to Fair Mile Gate, and not the quendum locum: and so it appears not that the robbery was within the hundred; but as to this, the Court held it should refer to both; and as to the first, that it was matter of evidence, and judgment for the plaintiff. — Show. 60. S. C. by the name of Young v. Tedcombe Hundred, adjudged accordingly. — Carth. 71. S. C. by the name of Young v. Tolscomb and Mudbury Hundred in Dorsetshire, adjudged accordingly. — And as to the not mentioning the robbery to be done in the highway. Comb. Show. and Carth. report it said per Cur. That all the later precedents in Rastal, and the two first say, that Coke's Entries too mention nothing of being in the highway, but Carth. says, it is true in the new precedents it is mentioned, and cites in the margin 2 Saund. 374. [which is Trin. 23 Car. 2. Pinkney v. East Hundred in Rutlandshire.]

* In an action upon the statute of Winton, the plaintiff had a verdict. It was moved in arrest of judgment, that the felonious taking was not laid to be in the highway. But the Court agreed that the action lies, though the robbery was not in the highway. Mod. 221. pl. 10. Mich. 28. Car. 2. in C. B. Savill's case.

12. Action upon the statute of hue and cry; after verdict it was moved in arrest of judgment, that *in the recital of the statute there were variances from the statutes, and omissions.* 1st, *There was no mention of burning of houses* in the recital, but that it is in the statute: non allocatur; for it is not necessary to set forth more in the declaration than is pertinent to the action. 2dly, *The statute is, that the country should answer for the bodies of the malefactors,* and the recital is quod patria respondeat pro malefactoribus, the sense of which is, that the country should stand in their stead; whereas the meaning of the statute is, that they should produce their persons: sed non allocatur; for it is in the recital of the declaration, it well answers the sense of the statute. 2 Vent. 215. Mich. 2 W. & M. in C. B. Anon.

13. B.

13. B. sent 4000*l.* by the Worcester carrier towards London, and diverse servants to guard the waggon, which was afterwards robbed in diversis hundredis of Burnham and Stone: B. and also his servants made oath of the robbery, &c. but he declared against the hundreds of an assault and robbery done to himself, when he was at Worcester above 50 miles from the place where the robbery was committed, and declared that he made oath that he did not know the robbers, or any of them, but said nothing of the robbery of his servants, or of any oath by them. The jury being ready at the bar to try the cause, the trial, on account of other business, was put off to another day, before which day the mistake was found in the declaration; for that he ought to have declared of a robbery on his servants, and of the oath made by them; and upon a motion to amend the declaration (for the time being lapsed for bringing the action, and consequently the action lost unless it were amended) the Court, upon great deliberation, and producing of precedents, ordered it to be amended, though this made great rasures and obliterations in the record. 3 Lev. 347, 348. Hill. 5 W. & M. in Scacc. Bearcroft v. Hundred of Burnham and Stone.

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14. Action upon the statute of hue and cry; non culp. pleaded, and verdict pro quer. It was moved in arrest of judgment, that no venue was laid where the examination before the justices of peace was within 20 days, which was traversable, and not aided by verdict, it being penal law. But per Cur. this is a remedial, and not a * penal law; and if penal, yet well enough, because it is not that which intitles the party to the action, but only causa sine qua non; but perhaps it might be fatal on a demurrer. 12 Mod. 242. Mich. 10 W. 3. Gilbert v. Inhabitants of Puddlesgate.

* See (U)
Pl. 2.

15. In action by A. the master, he declared that certain malefactors assaulted J. and R. his servants, and that 67*l.* the proper monies of the said A. in the custody of J. and 20 guineas in the custody of R. they feloniously took and carried away, &c. and had a verdict, and 80*l.* damages. It was moved in arrest of judgment, that the count was only of 67*l.* as the proper money of A. but as to the 20 guineas, they were not said to be the proper monies of A. For though they were in R's possession, yet A. not being present, it is not of consequence that they are the monies of A. as it might have been had A. been present; and therefore intire damages being given, it will be bad in toto. Afterwards the Ch. Justice said, that all the justices were agreed, that the plaintiff must have the property in the money of which the robbery was committed; and he and Tracy thought that it did not appear here that A. had the property of the 20 guineas; but Blencoe and Dormer being of the contrary opinion, the judgment was not arrested: Comyns's Reports, 327. pl. 166. Mich. 6 Geo. 1. Vaisey v. Whiston Hundred in Gloucestershire.

16. Persons on the road called to one Cox to change half a crown, that they might give something to a poor man then lying on the ground, and Cox pulling out his money, among which were several pieces of gold, one of them gently struck his hand, whereby the money fell on the ground. Cox got off from his horse, and offering

to take up the money, the prisoners swore that if he touched it, they would beat his brains out, by which Cox was put in fear of his life, and desisted. Upon an indictment, the jury found that the prisoners then and there immediately took up the said pieces of gold, and made off with them, and that Cox immediately pursued them about half a mile, and then the prisoners struck him and his horse, and swore, if he pursued them any farther, they would kill him; whereupon Cox ceased his pursuit, et si super totam materiam, &c. The Court of B. R. doubted, if this finding was so certain that they could determine it to be a robbery, and desired the opinion of the other judges, who met at Serjeant's Inn, who seemed unanimously to agree, that the case was to be considered upon the special verdict, and not to be made good by intendment or construction, and that here possibly it might have been well, if they had found that when Cox desisted, the prisoners at the same time, or without any intermediate space of time, or instantly, took it up; but the word (immediately) has great latitude, and is not of any determinate signification: and that (then and there immediately) in this case, does not necessarily ascertain the time, but leaves it doubtful; besides, it is proper to take notice, that here those words are not coupled in the same clause or sentence with the words preceding, but is a distinct clause and a separate finding. Thereupon the Court of B. R. pursuant to this opinion of the majority of the judges, held, that the defendants ought to be discharged of this indictment, though not out of custody; for though the verdict found no robbery, yet it appears, that they are guilty of grand larceny; for which no judgment can be upon this indictment, the offence being laid to be a robbery, in taking a persona; and that being the only doubt of the jury, the Court cannot give judgment against them upon this indictment, but must discharge them as to that, and remand them in order to be tried upon a new indictment for the grand larceny. Comyns's Rep. 478. pl. 210. Pasch. 8 Geo. 2. The King v. Francis & al.

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17. 8 Geo. 2. cap. 16. §. 13. *If any action shall be commenced for any thing done in pursuance of this or 13 E. 1. §. 2. or 2 Eliz. cap. 13. the defendant may plead the general issue.*

See(N) pl. 2.
—See(H)

(T) *Witness. Who. And Proof how.*

4 Le. 51. pl. 335. S. C. reported in the same words by the name of Terris and the Hon. died of, &c. case.

1. **I**N an action upon the statute the defendants pleaded not guilty. The plaintiff, to prove that he was robbed, as he had declared, offered to the jury his oath, in making good his declaration, which Anderson and Periam J. utterly refused; but Windham affirmed, that such an oath had been accepted in one HARRINGTON'S CASE, where the plaintiff could not have other evidence to prove his cause, in respect of secrecy; for those who have occasion to travel about their business, will not acquaint others what money, &c. they have with them in their journeys; and in some cases, the law admits the oath of the party in his own cause

cause; as in debt, the defendant shall wage his law: Periam said, that is an ancient law, but we will not make new precedents, for if such oath be accepted in this case, by the same reason in all cases where there is secrecy, and no external proof, whence would follow great inconveniencies; and though such an oath has been before accepted of and allowed here, yet the same does not move us; and we see no reason to multiply such precedents. 2 Le. 82. pl. 109. Trin. 28 Eliz. in C. B. Firrell and the Hundred of B's case.

2. Master may have the action where the servant was robbed: *In action* now to prove what money the servant had, he was made *prove he* *against a* *hundred, by* *the master,* *being a car-* *rier, upon a* *robbery* *committed* *upon his ser-* *vant, in the* *absence of* *the master,* *the master* *was ad-* *mitted a witness,* *to prove that he delivered the money of which his servant was robbed,* before his servant went on his journey in which he was robbed. Per Cur. against the opinion of Roll. See Trial, pl. 7. cites Mich. 1650. Bennet v. the Hundred of Hertford in the county of Hertford.—Sty. 233. S. C. but not S. P.

3. If a man has land within the hundred, but is not any inhabitant there, but before the action brought has demised it, for divers years yet to come, to J. S. who inhabits upon it, the lessor may be a witness in this case to *prove any thing for the discharge of the hundred*; per Cur. ruled upon evidence at bar. See Trial (G. f) pl. 6. cites Mich. 1650. Bennet v. the Hundred of Hertford.

4. In an action against the hundred, &c. at the trial some *poor* *housekeepers, who lived in the hundred, were produced as witnesses,* who being examined, said, they were poor, and *paid no taxes or parish duties,* and the question was, whether they should be admitted as evidence; Twisden said, that *alms-people and servants* are good witnesses; * but these were neither. And Wyld and Tirrell J. held, they ought not to be sworn, because though they are poor now, yet before the money recovered may be levied, they may be worth something. Mod. 73. pl. 30. Mich. 22 Car. 2. The Hundred of Stoak's case.

5. But 8 Geo. 2. cap. 16. S. 15. Enables inhabitants to be witnesses for the hundred, in the same manner as if he, she or they were not an inhabitant thereof, but resided in any other hundred whatsoever.

the hundred, who may be taken in execution albeit they pay no scot and lot, and they are chargeable to watch and ward, so the robbery is in their default; and Twisden conceived they ought not to be sworn, but Raynsford and Moreton contra; whereupon Twisden went into C. B. to know their opinion, and per Wild and Tyrrell, they ought not to be sworn, being able of body, and no alms-people or servants, for they may be contributory after, and they were set aside.

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(U) Trial. Venue.

1. **I**N an action on the statute of hue and cry, the *venire facias* must be *de prox' bundredo*; and if the action be laid in one vill, it may be proved within any other vill of the same hundred. Comb. 332. Trin. 7 W. 3. B. R. Anon.

2. In an action against the hundred, the venire was awarded *de comitatu*, and not *de vicineto*; and, after a verdict for the plaintiff, this was moved in arrest of judgment; for that the statute of the 4 & 5 Ann. 16. (which directs that venires shall be *de corpore comitatus*) excepts actions brought upon penal statutes, and that this action against the hundred must be considered as such; for it is not given merely to repair the plaintiff's loss, but as a punishment upon the hundred, for their default in not making hue and cry after the felon. And this appears further, inasmuch as the king is always made a party to the action, and cited 5 Mod. 314. But, after consideration, the Court held the venire was properly awarded *de comitatu*, according to the statute of Queen Ann, and that this action is not within the exception of that act; because it is * not to be considered as a penal action, according to the rule laid down in the case of SMITH v. PHILIPS, Mich. 4 Geo. 1. that † wherever a statute provides a remedy only for the party grieved, it is not a penal law: and that is the present case; and accordingly judgment was given for the plaintiff. Hill. 11 Geo. 2. B. R. Merrick v. the hundred of Ossulston.

* Note in Hob. 150. in case of NORRIS v. THE HUNDRED OF TAWTRY, it is said,

that though the party robbed deserves relief and pity, yet against the hundreds, which are innocent, it is a very penal law—See (S) pl. 14. contra to Hob.

† The same rule was laid down by the Court. Mich. 11 Geo. 2. B. R. Turner v Warren.

(W) Chargeable towards the Robbery. Who. And How. And of Contribution.

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E. C. was robbed in the hundred of H. in the confines of two counties &c. and brought his action upon

1. 13 Ed. 1. Stat. 2. **E**NACTS, That if the county do not produce the bodies of such offenders, they shall be answerable for the robberies done; and the damages (that is) every hundred where a robbery is done, with the franchise therein, shall be answerable for the robberies done there; and where a robbery is done in the division of two hundreds, both the hundreds, and the franchises within them, shall be liable, this statute, and had judgment, and sued execution to the sheriff of Stafford, who returned that he had levied 10 marks of the men of the bishop of Coventry and Litchfield of the hundred of H. The bishop came and said, that the hundred of H. was of the right of his church of St. Cadde of Litchfield, and shewed forth to the court the charter of King Richard the 1st. by which he granted to E. then bishop of Coventry and Litchfield, and to his men, that they should be quit of murder and larceny, that is, to be quit and discharged of every thing that lies in charge of his men, by reason of murder or felony; as of amerciaments, and presentment of murder and felony. But the authority of the book is, that the bishop's men ought not to be discharged; and Shard, that gives the rule, gives also two reasons thereof, 1st, That the charter of R. 1. could not discharge this action, for that at the time of that charter an action against the inhabitants, by reason of robbery, &c. was not granted, but it was granted long after, that is to say, in anno 13 E. 1. And we do not intend, that by reason of the charter, being more ancient than the statute of Winchester, you may bar or discharge the execution. 2dly, Albeit the king by his charter may grant, that a man may be acquitted against him and his successors, yet thereby the action or right of the party cannot be taken away. 2 Inst. 569, 570. cites Hill. 2 E. 3. fol. 6. 7. Ellice Caller's case.

And

And the country shall have but 40 days to agree for the robbery, and shall answer for the bodies of the offenders afterwards. It appears by Fleta that the time

given to the country by the statute of Winchester, is not within 40 days, as the book of statutes lately printed mistakes it, but *infra dimid' Anni*, and so is the printed book of statutes by Berthlett; and therefore it would be reformed accordingly. True it is, that the statute of 28 E. 3. does expressly set down 40 days; but yet the words of the statute of Winchester must remain as they were. 2 Inst. 569. — An action was brought upon this statute, and the plaintiff declared that none of the thieves were taken within 40 days according to the said statute. And after verdict for the plaintiff, this was moved in arrest of judgment, that the statute was mistaken for that this statute gave half a year for the taking the thieves, but that it was the statute of 28 E. 3. 11. which restrained it to 40 days, and cited 2 Inst. 569. and several other books, but upon several others being cited e contra, the Court appointed the *parliament roll* to be searched, and upon view thereof it appeared, that this statute gave 40 days only, and 28 E. 3. 11. is only a confirmation thereof; and thereupon judgment was given for the plaintiff. 3 Lev. 320. Mich. 3 W. and M. in C. B. *Pierfon v. Westward Hundred.*

* This statute does not say (shall take) but (shall answer for the bodies of the offenders) i. e., shall answer them to justice. And therefore if the felon be taken upon another account, and the country finding him in prison cause him to be indicted, this satisfies the statute. Arg. by North Solicitor General. Vent. 235. in case of *Methwyn v. Thistleworth Hundred.* — The book cites Goldsb. 55. [but I think the point there is not exactly the same.]

2. 27 El. cap. 13. S. 5. *Whereas the recovery and execution by and for the party robbed, is had against one, or a very few, of the inhabitants of the hundred, who have no remedy to be reimbursed by the rest of the inhabitants where such robbery is committed, it is hereby enacted, that after execution of damages by the party robbed, upon complaint of the party so charged, it shall be lawful for two justices of peace quor' un' inhabiting within the hundred, or near it, where any such execution shall be had, to assess, and tax rateably and proportionably every town, parish, village and hamlet, within such hundred, and the liberties within the same, towards an equal contribution. And after such taxation, the constables and headboroughs of every such town, parish, village and hamlet, shall have power within their several limits, rateably and proportionably to tax and assess every inhabitant therein; and if any inhabitant shall obstinately refuse to pay the said taxation and assessment, then it shall be lawful for the said constables and headboroughs, to distrain the goods and chattels of such refusers, and sell them for the use aforesaid, returning the overplus to the persons distrained.* A judgment was obtained upon the statute of hue and cry against the hundred of S. in the county of Bucks, and a fieri facias awarded against them. Leigh (the plaintiff) was seised of lands in the said hundred which he kept in his own hands.

but had no house, nor ever lodged in the hundred, and being assessed 10l. for his proportion towards the robbery, refused to pay it; and thereupon the sheriff levied the same, by taking two geldings, for which he now brought his action. The Ch. J. Nisi Prius held, that so long as he keeps his lands in his hands within the hundred, he shall be chargeable to the robberies, and be accounted an inhabitant within the hundred, within the meaning of the statute, notwithstanding that he never lodged within the hundred, so that he could not watch or ward; and if the statute should be otherwise expounded, it should be altogether eluded, because it might happen, that in a hundred all the owners of the lands might have houses, and dwell in another hundred. 3 Saund. 423. pl 71. Pasch. 25 Car. 2. *Leigh v Chapman.*

S. 6. *And every constable and headborough, after they have collected the said rates, shall within 10 days pay and deliver the same unto the said justices of peace or one of them, to the use of the inhabitants for whom such rate was made, to whom the justices shall deliver over the same upon request.* [270]

3. 39 Eliz. cap 25. Gives remedy for the inhabitants of the hundred of *Beymerst*, alias *Benburst*, in the county of Berks, for recovery of such sums of money as shall be obtained of them by force of the statute of 27 Eliz. 13.

S. 2. *Provided that no such remedy shall be had for the whole money, but only in these cases, viz. where no such notice (as by 27 Eliz. cap. 13* was

was appointed) shall be given to the inhabitants of the hundred of Beynersh or where the inhabitants of the same hundred (after such notice, or after hue and cry brought) shall make fresh suit and pursuit after the offenders with horsemen and footmen.

Mar. 11. pl.
28. Pasch.
15 Car. Sir
J. Compton's case.

4. If a man be robbed in an hundred, and after a hundredor sells or leases his land, the purchaser or the lessee shall be charged; for the land itself is for that charged. Noy. 155. Ld. Compton's case.

It was said by Barkley J. that all who are inhabitants at the time of the execution, should pay it. Hutt. 125. Mich. 10 Car. in Dean's case, the sheriff having taken the goods of one in execution, who was not inhabiting within the hundred at the time of the robbery committed, but came in afterwards, the Court was of opinion that he was not chargeable.

Sec(R) pl. 4

(X) Charges of Officers reimbursed.

1. 8 Geo. 2. cap. 16. S. 7. **I**F any plaintiff, in any action to be brought against any hundred, shall be nonsuited, or discontinued, or have judgment given against him, it shall be lawful for any 2 justices (such as are before-mentioned) upon complaint, and upon account given in by such as high constable, and proof made upon oath to the satisfaction of the justices, of expences necessarily laid out, to make such taxation, in order to reimburse such high constable what he shall have necessarily expended in defending such action over and above the costs taxed; and in case it shall appear upon oath to the justices that such plaintiff and his sureties are insolvent, it shall be lawful for such justices to make a taxation, in the manner directed by the statute of 27 Eliz. cap. 13. to reimburse such high constable such taxed costs as by reason of such insolvency he shall not be able to recover from the plaintiff.

S. 8. The money rated for the reimbursement of the high constable in case of judgment given against the plaintiff, shall be paid within 10 days after collection to the justices, or one of them, to the use of such high constable.

(Y) Indictment, and where the Felon shall have his Clergy.

1. **A**N indictment was for a robbery in *quadam via regia pedestri*, leading from London to Islington, and found guilty, and before judgment he prayed his clergy, and had it, because the indictment was not for a robbery in *alta via regia*, as mentioned in the statute, nor in *via regia*, but in *quadam via regia pedestri*, Mo. 5. pl. 16. Trin. 38 H. 8. Anon.

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2. H. was indicted for feloniously taking of 4l. in a purse from the person of B. the prosecutor. The case was, the defendant, being on horseback, desired B. to open a gap for him to ride through, and as B. was going up a bank to open the gap, the defendant passing by him, put one hand on the prosecutor's shoulder, and the other in his pocket, and took the purse, which the prosecutor perceiving in his hand, he demanded the purse, but the other refused to deliver it. But because the purse was not taken with any force or violence, so as to put the

the prosecutor in any fear, but as it were by stealth, the defendant had his clergy. 2 Roll. Rep. 154. Hill. 17 Jac. B. R. Harman's case.

(Z) *Indemnification of Persons taking Persons upon Hue and Cry, or Killing Robbers.* See (M) pl 1

1. **T**RESPASS of assault, battery, and imprisonment, at D. in the county of S. the defendant said, that the plaintiff, at the time of the trespass, was at R. in the same county, in a way which leads from P. to Q. and there lay in wait to rob the people of the king, and Alice M. rid there, against whom the plaintiff drew his sword, and commanded her to deliver her purse, and the feme levied hue and cry; and the defendant was there, and heard the cry, and returned, and took the plaintiff; and because they had no stocks in this vill, he carried him to S. &c. and delivered him to the constable, which coming is the same assault, and the putting of hands is the same battery, and imprisonment, &c. *Abque hoc* that he assaulted, menaced, or beat him at D. And per tot. Cur. the justification is good, but the *abque hoc* was ousted, for he may justify it in any place where he can take him, though he did not do the felony in fact. Br. Trespas, pl. 184. cites 9 E. 4. 26.

2. 24 H. 8. cap. 5. If any be indicted or appealed for the death of a person attempting to rob (and so found by verdict) he shall forfeit no lands, or goods for the same, but shall be fully acquit and discharged thereof. See forfeit-ure (E)

3. Where hue and cry either by the common law, or by force of any statute, is levied upon any person, the arrest of such person is lawful, through the cause of hue and cry be feigned; and if the cause be feigned he that levies the same shall also be arrested, and shall be fined and imprisoned; but common fame and voice is not sufficient to arrest a man in case of felony, unless a felony be done indeed. 3 Inst. 118. cap. 52.

For more of Robbery in general, see Appeal, Forfeiture, Restitution, Trespas, and other proper Titles.

Rumours.

(A) *Injurious to Trade, and detrimental to the Publick.*

1. **A**LOMBARD was indicted for concealing the king's customs, and that he procured, and was a promoter of increasing the price of merchandize of another realm, and he demanded judgment (because The pro-
sement in
good, the
the inst-
it

cing was not put in ure; for per Knivet J. he who reports in the country that there is war beyond the sea, so that the wool cannot pass the sea this year, by means whereof the price of wool sunk, and were sold at a less price, whereupon he was made to go before the council of the king, and make fine and ransom to the king, by which the Lombard pleaded not guilty. Br. Presentment in Courts, pl. 12. cites 43 Aff. 38. ——— Fitzh. Aff. pl. 254. and 43 Aff. 38. is that the plea of the defendant was not allowed.

S. P. Br. indictment
pl. 40. cites
43 Aff. 38.

2. An *alien* goes to Coteswold, and there falsely publishes that so much wool was already transported to parts beyond the seas, that they would buy no more this year; and the publishing of this false report was *to the intent that the price of wool should fall*. This alien, for this falsity, was indicted, convicted, fined, ransomed, and imprisoned. At this time it was lawful to transport wool, which was afterwards restrained. Jenk. 49. pl. 93.

4. And the law is the same for publishing *that the coin is debased*, and for *every falsehood* which may occasion any detriment to the publick. Jenk. 49. pl. 93.

For more of **Ramours** in general, see **Actions for Words, Treason**, and other proper Titles.

Safe Conduct.

1. **S A F E** conduct is a privilege granted by the prince to foreigners of coming safely into his kingdom or dominion, and of returning thence, the which in times of war is frequently granted to enemies either to treat of peace, or the redemption of captives or the like, and is given under the great seal. Spelm. Gloss. Verbo, *Salvus Conductus*——And for the form thereof see Regist. 25, b. 26. 2

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This statute
concerns
merchant
strangers;
and Ed.
Coke tells
us, that

2. 9 H. 3. cap. 30. enacts, that all merchants (if they were not *openly* [or publickly] prohibited before) shall have their safe and sure conduct to part out of England, to come into England, to tarry in and go through England, as well by land as by water, to buy and sell without any manner of evil tolls by the *old and rightful customs*, except in time of war.

king Alfred, and the antient kings forbid merchant aliens coming and trading in England, at 4 fairs, and that they should not stay there more than 40 days. 2 Inst. 57. cites Mirror bap. 1, §. 3. and cites the laws of king Ethelred, cap. 2. which say, that *mercatorum navigia, vel inimico-*

rum

rum quidem quæcunque ex alto (nullis jactata tempestatibus) in portum aliquem invehentur tranquilla pace fruuntor, quin etiam si Maris acta fluctibus ad domicilium aliquod illustre; ac pacis beneficio donatum, navis appulerit inimica, atque istuc nautæ confugerint, ipsi & res illorum omnes augusta pace potiuntor.—In the Chronicon Johannis Brompton among the decem scriptores, pag. 900. S. 2. It is thus, viz. et omnis *Seapscrip.* i. navis infitor, pacem habeat qui in portum veniat, licet navis sit inimicorum, si non sit abacta tempestatibus, & licet abacta sit, & applicetur ad aliquam curiam pacis & homines evadant in ipsam curiam, pacem habeant & quod attulerint secum.

¶ The orig. is (ne hantast.)

* Before this statute, merchant strangers might be publickly prohibited and this prohibition is intendable of merchant strangers *in amity*; for this act provides afterward for merchant strangers enemies; and therefore the prohibition intended by this act, must be by the common or publick council of the realm, that is, by act of parliament, for that it concerns the whole realm, and is implied by this word (publickly) 2 Inst. 57.

All merchant strangers in amity (except such as be so publickly prohibited) shall have safe and sure conduct in 7 things. 1, To depart out of England. 2, To come into England. 3, To tarry here. 4, To go in and through England, as well by land as by water. 5, To buy and to sell. 6, Without any manner of evil tolls. 7. By the old and rightful customs. 2 Inst. 57.

† The word *tolnetum*, and *telonium*, and *theolopium* are all one, and do signify in a general sense any manner of custom, subsidy, prestation, imposition, or sum of money demanded for exporting, or importing of any wares or merchandises, to be taken of the buyer. They are called *male tolleta*, when the thing demanded for wares or merchandises, do so burden the commodity, as the merchant cannot have a convenient gain by trading therewith, and thereby the trade itself is lost or hindered. And in divers statutes *maletout* for *maletot*, or *maletour* is a French word, and signifies an *unjust exaction*. 2 Inst. 58.

‡ The words (old and rightful customs) mean, ancient and right duties due by ancient and lawful custom. 2 Inst. 58.

•• The ancient and rightful customs were for wools, woollens, and leather, and at common law no other customs were paid. 12 Rep. 33, 34. in the case of customs, &c.—See prerogative (F. 2) &c.

And if they be of a land making war against us and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be intreated there in the land making war against us.

* Ld Coke 2 Inst. 58. says, this is to be understood of the guar-

dian, or keeper of the realm in the king's absence.—As for such merchant strangers as come into the realm after the war begun, they may be dealt with as open enemies. Ibid.

And if our merchants be well intreated there, theirs shall be likewise with us.

This is *jus belli*; et *in republica*

maxime conservanda sunt jura belli. 2 Inst. 58:—And the end of all such restraints is *salus populi*. 12 Rep. 33. in the case of customs, &c.

3. 15 H. 6. cap. 3. Enacts, that the keepers of the great and privy seal, shall not suffer the clause *vindimus* to be put in any safe conduct, unless some great cause move the king to grant the same in such wise, and in all safe conducts to be granted to any persons, the names of them, of the ships and of the masters, and the number of the mariners, with the portage of the ships, shall be expressed.

4. 18 H. 6. cap. 8. Enacts, that goods may be loaded into the ships of the king's enemies, so as the merchant hath an authentick safe conduct for them; otherwise they may be made prize by any that can take them.

5. 20 H. 6. cap. 1. Enacts, that all letters of safe conduct which be not inrolled in the Chancery before the delivery of them, shall be void.

They who will take the benefit of the king's safe conduct, shall have it ready inrolled at the time of their apprehension; howbeit, although the safe conduct be not presently shewed, yet it will suffice if it be afterwards proved to be then inrolled.

6. Of ancient time, and until latter days, no ambassador came into this realm before he had a safe conduct; for as no king, &c. can come

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come into it without a licence or safe conduct, so no prorex, &c., who represents a king's person, can do it. 4 Inst. 155. cap. 26.

7. A merchant alien, who had the king's *securum* and *salvum conductum* tam in corpore quam in bonis, *bailed goods to A. to be carried to Exeter*, and these goods were put into boxes sealed up; A. carried these goods to another place, breaks the boxes, takes out the goods, and flies with them, and warves them in his flight; these goods, in this case are not forfeited as waived, because of the said safe conduct. Jenk. 132. pl. 69.

8. A safe conduct will only keep the party safe from harm, but will not protect him from actions. Godb. 366. pl. 457. Hill. 2 Car. B. R. in case of *Busher v. Murrey*.

For more of safe Conduct in general see *Allen, Prerogative*, and other proper Titles.

Sale.

(A) Sale for Portions decreed upon Settlements, though no Words directing it.

1. **L**ANDS are settled on marriage, on condition that if there should be a daughter, the persons in remainder *to pay her 2000l. at 16, with power for the daughter, in case of non-payment, to enter and distrain for the 2000l. and damages*, and the trustees to stand seised to that intent. Though here was no power given to sell, yet the land charged being but 120l. per ann. and the 2000l. being to be paid with damages, and at her age of 16, and was no more than her mother's fortune, and that she was 20 years old when she married, and was now 24, and had no power to enter and hold till satisfied, yet decreed the trustees to sell and raise the portion. 2 Vern. 1. Trin. 1686. *Meynell v. Massey*.

2. A. had a power to charge an estate with 5000l. for daughters' portions, at 18 or marriage; he executes his power, and expressly declares that the estate shall stand charged, and then he proceeds, and says, *that for the more effectual raising the 5000l. the trustees should enter, and hold until the money be raised by rents and profits*, the portions being to be raised at a prefixed time, and the rents not being sufficient to answer the very interest. Ld. Somers decreed the lands to be sold. 2 Vern. 310. pl. 301. Hill. 1692. *Shelden v. Dormer*.
 So where there was no prefixed time. 2 Vern. 420. pl. 383. Pasch. 1701 by Lord Chan. Somers, *Warburton v. Warburton*.
 —S. P. 12 Mod. 814. Hill. 12 W. 3. Lord Keeper Wright said, that if there had been no time limited

limited for raising this money, and the lady, to whose use it was, was so young that a speedy raising of it was not necessary, and that there was a sufficient estate out of the profits whereof it might be raised without sale; the court would not in that case decree a sale, but here the time being expressly fixed, there must be a sale, rather than it should not be then raised. And so it was decreed.

* 3. If the ordinary or annual profits of the lands settled on marriage, for raising *portions* for daughters, will not raise the money in a convenient time to answer the intent of the settlement, and the money is limited to be raised *out of the rents, issues and profits*; in a court of equity, it may be decreed to be raised by sale or mortgage. And though the daughters *had been in possession some time of the lands*, and received the rents and profits thereof, yet still the lands may be sold to raise the residue; and the rents, &c. already received, shall be *applied first to discharge the interest*, and then the principal. Per *Ld. C. Cowper. Ch. Prec. 435. Trin. 1716. Stanhope v. Thacker.*

For more of **Sale** in general see **Creditors, Debts, Heir, Portions, Trust, and other proper Titles.**

(A) **Salvage.**

1. **B**Y the naval laws of Oleron, if a *ship* departing with her lading to any place abroad, happens *in the course of her voyage* to be rendered unfit to proceed therein, and the *seamen save as much of the lading as possibly they can*; if the merchants require their goods of the master, he may deliver them if he pleases, they paying the freight in proportion to the part of the voyage that is performed, and the costs of the salvage: but if the master can readily refit his vessel, he may do it; and although he has promised the people who helped him to save the ship, the third or the half part of the goods saved, for the danger they ran therein, yet if such a cause comes before any judicature, it shall be considered the pains and trouble they have been at, and the reward be accordingly, without any regard to the promises made them by the parties concerned, in the time of their distress. *Laws of Trade, &c. 109. cap. 9. cites Leg. Oleron, cap. 4.*

2. If a *ship* put to sea with merchants goods, and there she is *disabled, or perishes* by the fault of the master, or his men; the goods that are saved shall be secured in a certain place free from danger; but if it be proved by witnesses, that the misfortune was occasioned *by tempest*, what remains of the ship and goods shall be brought to a contribution, and the master shall retain half the value of the freight by the laws of Rhodes. And the same laws have ordained, that if a ship

a ship be surprised at sea with whirlwinds, or wrecked at sea, any person saving any part of the wreck, shall have one fifth of what he saves. Laws of Trade, &c. 109, 110. cap. 9. cites Leg. Rhod cap. 27 45.

3. For the charges of salvage, very great allowances have been made; as, to the divers and salvors the half, the 3d, or the 10th of the things saved, according to the depth of the water out of which they were fished, whether 15, 8, or 1 fathom; also a 10th part for salvage on the coast, and the 5th to him that saving himself, carries something with him: * If the ship only perishes, and the goods be saved, then the goods shall pay the 10th or 5th, as the difficulty of the saving thereof shall require; and gold, silver, silk, and the like, being of easy transportation, shall pay less than goods of greater weight, and more burthensome for carriage, which are in greater danger. Laws of Trade, &c. 110. cap. 9. cites Sea Laws 125. Lex Mercat. 119.

* Molloy,
Lib. 2. cap.
8. S. 4. S. P.

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4. Where things are cast up by ship wrecks or left through castings in storms the laws of Rhodes allow to the finder a third for the saving; and in France they allow one third part for salvage: but by the common custom of countries, every person of quality, or lord of a manor, &c. claims all as his own, if it comes upon his land; contrary to some sea laws, which give it to the finder; though by the opinion of lawyers, the finders thereof should do therewith as with other goods found upon land; they ought to proclaim the things to be forthcoming to the true owner or loser; and if no man claim the same, then the finder to keep them to himself. Laws of Trade, &c. 110. cap. 9. cites Lex Mercat. 119.

2 Salk. 654.
Pl. 2. S. C.

5. Trover for goods; the defendant pleads that they were in a ship, and that the ship took fire, and that they hazarded their lives to save them; and therefore they are ready to deliver the goods, if the plaintiff will pay them 4l. for salvage, &c. The plaintiff demurred generally. And Holt Ch. J. held, that they might retain the goods until payment, as well as a taylor or an ostler, or common carrier. And salvage is allowed by all nations, it being reasonable that a man shall be rewarded who hazards his life in the service of another; but this matter should be given in evidence. Ld. Raym. Rep. 393. Mich. 10 W. 3. Hartford v. Jones, &c.

6. By the statute of 12 Ann. cap. 18. S. 2. All persons required by sheriffs, &c. constables, &c. who shall act in the saving and preserving any ship in distress on our sea-coasts, or the cargoes thereof, shall, within 30 days after, be paid a reasonable reward for the same, by the commander or owner of the ship, or merchant concerned; and in default thereof, the ship or goods so saved shall remain in the custody of the officers of the customs till payment be made or security given. And if any difference arise about the salvage three neighbouring justices of peace shall adjust the quantum to be paid to the persons acting therein, which shall be binding to all parties, and recoverable in an action at law.

7. In trover for a ship, in order to justify the taking of the ship, the defendant proved, that she was stranded on part of the manor of Southwold: no body was then on board her; upon which he boarded her himself, and detained her as bailiff to Sir Charles Bloyce, who was intitled to all wrecks and salvage in the manor of Southwold, as lord of this manor.

manor. The judge thought this a matter of too great difficulty to be determined at nisi prius; whereupon a verdict was given for the plaintiff, subject to his lordship's opinion. 2 Barnard Rep. in B. R. 407. Hill. 7 Geo. 2. 1733. Everard v. Cob.

For more of Salvage in general, see Wreck and other proper Titles.

* Satisfaction.

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(A) *What shall be said to be a Satisfaction, and for What.*

1. **O**NCE a recompence and always a recompence: so that if land recovered in value be of a defeasible title, and evicted, no further recompence shall be had. As if the demandant in formedon be barred by warranty and assents, though the assents be afterwards evicted, yet the tail is gone for ever. Arg. D. 139. pl. 32. Hill. 3 & 4 P. & M. But the reporter adds, quære hoc.

2. A release is a satisfaction in law. Noy. 5. Albany v. Manny.

3. A personal thing cannot be a satisfaction for a real thing. Per Warburton J. 2 Brownl. 131. Mich. 9 Jac. C. B. in the case of Peto v. Checy.

4. Debt on a single bill; the defendant pleads feoffment of lands in satisfaction of the debt; the plaintiff demurred, and on reading the record ruled to be an ill plea to a single bill; otherwise it had been on bond with condition to pay money. Brownl. 70. Trin. 11 Jac. Glyver v. Lease.

5. Payment of 10 quarters of grain can be no satisfaction for 20 quarters; per Coke Ch. J. And if a man is bound to pay 10l. at a day, if he pays 5l. at the day in satisfaction, yet it is no satisfaction; per Coke, Haughton, and Doderidge. Roll. R. 173. pl. 3. Pasch. 13 Jac. B. R. in Cumberland's case.

6. Whosoever I suffer any injury joined with a loss, the law shall give me a remedy and recompence according to my certain or uncertain loss, yea and sometimes where the thing is not in being, but utterly extinguished; as if the case were, that a man should have yearly 2 deer out of the same park; the disparking would not hurt; for he should have the value ever; per Hobart Ch. J. Hob. 43. in the case of Cowper v. Andrews.

Roll. Rep. 123. accordingly, by Hobart. Hill. 12 Jac. in the case of Hooper v. Andrews, but is S. C.

7. If

S. P. by Ho-
bart. Roll.
Rep. 123.

7. If a man has *common of estovers* in my woods, viz. so many loads by the year certain, or else uncertain, viz. as much as he shall spend in fires, and in repairs of his house; if I *stub up this wood*, so as there neither is, nor will be any wood again, yet he shall have an *assise from year to year of his common of estovers*. Hob. 143. in the case of Cowper v. Andrews.

8. A *promise* cannot be extinguished by a bill under band alone; because in law it is of *no higher nature*. 12 Mod. 86. Mich. 7 W. 3. Stayner v. Baker.

9. 3 & 4 Ann. cap. 9. Enacts, that if any persons give such bill of exchange (as therein mentioned) in *satisfaction of any former debt*, the same shall be esteemed a full payment, if he does not make his endeavour to get the same accepted and paid, and make his protest (as therein mentioned) for *non-acceptance or non-payment*.

[278] 10. A. in consideration of 6000l. portion with M. by marriage-articles, covenanted with trustees to lay out, within one year after the marriage, the said 6000l. and to make it up 30,000l. in the purchase of lands to be settled on A. for life, remainder to trustees to preserve, &c. Remainder for so much as would amount to 800l. a year to M. for a jointure, remainder of the whole to the first, &c. son of the marriage in tail male, &c. remainder to trustees for 500 years to raise daughters portions, remainder to A. his heirs and assigns for ever; but if no daughters, then the term to cease for the benefit of A. his heirs and assigns for ever.—After the marriage A. purchased several estates in fee, but never settled them; and likewise purchased several terms, and died intestate, and without issue, leaving 1800l. a year real estate to descend upon the plaintiff, his nephew and heir at law. And A. further covenanted, that until the 30,000l. laid out as aforesaid, interest should be paid for the same after the rate of 5l. per cent. unto the persons entitled to the rents, &c. of the lands when purchased.—M. took out administration, and the plaintiff by bill prayed an account of A's personal estate, and to have the covenant carried into execution, his remainder, by the death of A. without issue, now taking effect; and also to have some purchases compleated which were left incomplete at A's death. It was insisted for the defendant, that the plaintiff was *not privy to any of the considerations in the covenant*, and so could not compel M. to lay the 30,000l. out for his benefit. But if he could, that the 1800l. a year lands descended to him ought to be taken as a full satisfaction. But both points were decreed at the Rolls for the plaintiff, the heir at law. And upon hearing before the lord chancellor, his lordship said, that the cases upon satisfaction are generally between debtor and creditor; and the heir is no creditor, but only stands in his ancestor's place. One rule of satisfaction is, that it depends upon the intent of the party, and that which way soever the intent is, that way it must be taken. But this is to be understood with some restrictions, as, that a thing intended for a satisfaction be of the same kind, or a greater thing in satisfaction of a lesser; for if otherwise, this court will compel a man to be just before he is generous; and so will decree both. Select Cases in Can.

Can. in Ld. Talbot's time 80 & 92. Pasch. 1735. in the case of Lechmere v. Lady Lechmere.

11. A gift by a freeman of London in his life-time was construed a satisfaction of a like sum bequeathed to the same child by will subsequent to the gift. See Cases in Equ. in Ld. Talbot's time 71. Pasch. 1735. Upton v. Prince.

12. Any writing obligatory sealed determines or merges any duty by contract; because a specialty is of a higher nature. Went. Off. of Executors 116.

For more of Satisfaction in general, See Acceptance, Accord, Condition, Devisé, and other Proper Titles.

School and Schoolmaster.

1. **I**N trespass it was doubted if a schoolmaster may strike his scholar for negligence or default. Br. Trespals, pl. 349 cites 21 E. 4. 6.

2. 23 Eliz. cap. 1. Enacts, that none shall keep a schoolmaster which absents himself from church, or not allowed by the bishop or ordinary, in pain of 10l. for every month he so keeps him; and such schoolmaster shall be for ever after disabled to teach youth, and shall suffer one whole year's imprisonment without bail.

3. 1 Jac. 1. cap. 4. Enacts, that none out of the universities shall keep school, except a free-school, or in some persons house that is no recusant, or by licence of the bishop or ordinary, in pain to forfeit 40s. a day.

measure, settled, that they are impliedly repealed by that act. And 12 Ann. 7. which obliged schoolmasters to subscribe the declaration concerning the Liturgy, and to have a licence from the bishop, is repealed by 5 Geo. 4. Hawk. Abr. Pl. C. 15. cap. 9.

4. Prohibition to stay a suit in the ecclesiastical court against a schoolmaster for keeping a school without a licence, pursuant to the statute of 1 Jac. 1. cap. 4. Par. 9. upon a suggestion that the said statute gives a penalty of 40s. per diem against every such schoolmaster, and that by law *nemo bis puniri debet pro uno & eodem delicto*. And per Cur. a prohibition was granted, and so it was in the case of *OLDFIELD v. SIR RICHARD RAINBOR*, on the like suggestion. Carr. 464. Mich. 10 W. 3. B. R. Chedwick v. Hugner.

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These statutes are still in force as to persons not within the benefit of the toleration act; but as to such persons it seems to be in a great measure repealed by that act. And 12 Ann. 7. which obliged schoolmasters to subscribe the declaration concerning the Liturgy, and to have a licence from the bishop, is repealed by 5 Geo. 4. Hawk. Abr. Pl. C. 15. cap. 9.
*S. C. cited Ld. Raym. Rep. 693. in the case of the King v. Davison.

5. A schoolmaster being a *layman* was prosecuted in the ecclesiastical court for not *bringing his scholars to church* contrary to the 79th canon in 1603. And it was the opinion of Treby Ch. J. and Powell J. and the Court, that he being a layman was not bound by the canons. Wm's Rep. 32. in a note there, cites Pasch. & Hill. 10 & 11 W. 3. Belcham v. Barnardiston.

6. The defendant was *indicted for having kept a school without licence of the bishop of the diocese, &c. contra formam statut.* Upon which it was moved to quash the indictment (being removed hither by certiorari) and the *exceptions* that were taken the last term were, 1, *That there was no statute* that prohibited keeping school without licence, but 1 Jac. 1: cap. 4. Par. 9. and the said act prescribed a particular punishment, viz. forfeiture of, &c. therefore it was not an offence indictable, being a new offence. 2. This indictment was found before the justices of peace at the quarter sessions, and they have no power by the act, and therefore it was void. 3dly, This school was not within the act of James I. because the act extends but to grammar schools, and this school was for writing and reading. And afterwards in this term, after a rule made, that cause should be shewn upon notice, why, &c. the indictment was quashed. Ld. Raym. Rep. 672. East. 13 W. 3. The King v. Douse.

7. A school being erected by the voluntary contribution of the inhabitants of A. on the waste of the lord of the manor, the lord infeoffs trustees in trust that the inhabitants of A. may for ever have a school, &c. as of the gift of the lord. Whether the trustees or the inhabitants are to nominate the schoolmaster? 2 Vent. 387. pl. 355. Mich. 1700. Att. Gen. &c. v. Hewer.

8. If a school be not a *free-school*, the inhabitants have no right to sue in the attorney general's name; per Ld. Wright. 2 Vern. 387. pl. 355. Mich. 1700. Att. Gen. v. Hewer.

For more of School and Schoolmaster in general, See Prohibition, and other Proper Titles.

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This is a judicial writ, and properly lies after the year and day after judgment given, and is so called, because the words of the writ to the sheriff be, quod

*** Scire facias.**

(A) How it must be.

1. **S**CIRE facias against A. who held 3 acres, and against B. who held 6 acres, and against C. who held 2 acres as several tenants, and the perclose in the summons was by joint words, as if they

they had been jointenants, and therefore the writ was challenged quod nota. Br. Scire facias, pl. 201. cites 24 E. 3. 23. scire facias præfat. T. (being the defendant) quod sit coram, &c. ostensurus si quid pro se habeat aut dicere sciat, quare, &c. so as by the writ appears, that the defendant is to be warned to plead any matter in bar of execution, and therefore albeit it be a judicial writ, yet because the defendant may thereon plead, this scire facias is accounted in law to be in nature of an action. Co. Litt. 290. b. — See (G) — Execution (R. a)

2. In scire facias the writ was *cum J. N. recuperasset, seisinam suam against such an one*, and did not say by what writ, and yet the writ was adjudged good by award, quod nota. Br. Scire facias, pl. 31. cites 44 E. 3. 11.

3. Scire facias by A. as son of J. daughter of A. and J. and cousin and heir of them the said A. and J. &c. it shall be intended here that J. father of A. is dead; for otherwise he cannot be cousin and heir to A. and J. father and mother of the said J. quod nota. Br. Scire facias, pl. 233. cites 11 H. 6. 43.

4. A scire facias upon a judgment against the principal defendant was *in hac parte*. And per Holt Ch. J. on search of precedents, where it is against the defendant himself, it should be in hac parte, but where against the bail, it should be *in ea parte*, and this will reconcile the precedents. 2 Salk. 599. pl. 5. Mich. 10 Will. 3. B. R. Lugg v. Goodwin. 12 Mod. 214. S. C. by name of Luck v. Goodwin, says, that exception was taken,
that whereas it was said *petit judicium pro misis & custagiis in hac parte* that it should have been in ea parte, but in hac parte was held good. — Ld. Raym. 393. S. C.

5. A scire facias is a judicial writ, and must pursue the nature of the judgment, so that where the judgment is joint, the sci. fac. must be so too. 2 Salk. 598. pl. 1. Trin. 1 W. & M. B. R. Panton v. Hall. Carth. 105. S. C. accordingly.

(B) Brought. In what County.

1. SCIRE facias upon recovery of an annuity, or of debt in banco shall be brought in Middlesex; for there is the record, and the matter is not local, though the grant or the contract was in another county. Br. Scire facias, pl. 189. cites 18 E. 4. 18. Br. Lieu, pl. 60. cites S. C.

2. But upon recovery of land, or damage for tort in land, the scire facias shall be brought in the county where the land is; for those are local. Note the difference. Br. Scire facias, pl. 189. cites 18 E. 4. 18.

3. Debt was brought in London against an executor, who pleaded *plene administravit*, which was found for the plaintiff, who assigned the judgment to the queen, and thereupon a sci. fac. issued out of the Exchequer against the defendant into the county of D. upon a constat that he had certain goods there. The sheriff returned *nulla bona*. It was agreed by all the barons, that a scire facias may issue out of another court, than where the record of the judgment remained, and into another county, than where the writ is brought, or the party is dwelling. 2 Le. 67. pl. 90. Trin. 31 Eliz. Noon's case. [281]

Jenk. 291. pl. 32. S. C. —Cro. J. 353. pl. 8. S. C. but not S. P. —It must always be brought in the same county where the first action was laid. Hob. 4. pl. 7. S. C. —Yelv. 218. MUSGRAVE v. WHARTON, S. C. Hill. 9 Jac. B. R. But because the defendant, who was sued as administrator of him against whom the judgment was recovered, had pleaded plene administravit, which he should not have done, because thereby he admitted the scire facias good, whereas he *should have pleaded in abatement* of it, by *showing the first action to have been brought in the county of Cumberland*, for that reason the Court gave judgment there for the plaintiff: but advised the defendant to bring error, and shewed their opinions clearly that it would be error; because now after judgment in the sci. fa. the first judgment, and this execution upon the sci. fa. make but one record, of which the judges in the Exchequer Chamber ought to take notice. The reporter says, quod nota, a good case of experience.

An action of debt on the original judgment, or upon a recognizance, may be laid in any county, but a sci. fa. must always go in *that county where the execution on the original judgment should be made.* 8 Mod. 73. Pasch. 8 Geo. 1793. Anon.

Brownl. 69. S. C. but the action being debt, nothing is said as to the point of the sci. fa. unless by Hutten Serjeant. Arg. —Hob. 195. 196. pl. 248. S. C. and there Hobart Ch. J. cites 6 Mar. Br. Lieu, pl. 85. where it is resolved by all the prothonotaries, that a sci. fa. upon such a recognizance, shall be directed to the sheriff of London, and not of Middlesex. And Gager cited a precedent, that upon a judgment given in C. B. at Hertford town, and the records brought hither after; yet the sci. fa. went to the sheriff of Hertford, and not to the sheriff of Middlesex, whereof the reason must be, because in the record itself it appeared, that the judgment was given at Hertford; and the like reason is in this case. But *if the entry of the records were general*, that the recognizances were taken *before me*, it should be understood in court, and then the action was to be brought in Middlesex. Cites 18 E. 4. 18. 24 E. 3. 22. 73. 22 H. 6. 38. Br. Lieu, 29. 36. and Brief 191.

In such a case, the Court held that it was at the election of the recognissee to bring his sci. fac. either in London, where the recognizance was acknowledged, or in Middlesex, where it was delivered and inrolled. But adjourned. Afterwards, viz. Pasch. 23 Car. the Court held, that the scire facias ought to be *where the recognizance is taken, and not where it is recorded*; for there it begins to be a record; but this being in C. B. it was good both ways, and thereupon the party had his judgment. Style. 9. Pasch. 23 Car. Andrew's case. —Error was brought in B. R. and HALL AND WINCKFIELD'S CASE. Hob. 195. was cited, and the case was much debated; and Roll. (Bacon absent) said, that the most ancient and proper course was to bring the sci. fa. where the recognizance was taken; but he shewed in his hand a certificate of all the prothonotaries of C. B. that of latter times they have *allowed it the one way or the other*, and so the judgment was affirmed. And Pasch. 20 Jac. Rot. 210. B. R. between POLTING AND PAIREBANK, the like judgment was given upon a recognizance taken before one of the judges of this court in London, and a sci. fa. brought in Middlesex; but it was said, that the *usual entry in this court, is to express before what judge it was taken, but no place where*; and then it might be brought in Middlesex without question. All. 12, 13. Pasch. 22 Car. B. R. Andrews v. Harborn. —S. P. But if the recognizance be not inrolled, then it lies in London only. 8 Mod. 290. Trin. 10 Geo. Palmer v. Byfield.

1. **I**N trespass, issue passed for the defendant at the nisi prius, and the parol is put without day by demise of the king before the day in bank; there the defendant shall cause the record to be certified

tified in bank, and shall have scire facias against the plaintiff to have judgment against him, et sic de similibus; for he cannot have re-attachment nor resummons inasmuch as he is defendant; by some of the King's Bench. Br. Scire Facias, pl. 181. cites 10 E. 4. 13.

2. In *replevin*, they were at issue, and after the *parol* was without day by demise of the king; and per tot. Cur. the defendant shall have scire facias in lieu of resummons to revive the issue; and so may be garnishee after such issue. Br. Scire facias, pl. 195. cites 10 E. 4. 15.

Br. Resummons, pl. 26, cites S. C.

3. So where two bring several writs of ward, by which they enterplead, there the last plaintiff shall have scire facias. Br. Scire facias, pl. 195. cites 10 E. 4. 15.

Br. Resummons, pl. 26, cite S. C.

4. So for the defendant in *quare impedit*. Br. Scire facias, pl. 195. cites 10 E. 4. 15.

Br. Resummons, pl. 26, cites S. C.

5. *Contra in appeal*; for there the defendant is not to recover; quod non negatur. Br. Scire facias, pl. 195. cites 10 E. 4. 15.

Br. Re-attachment, pl. 33, cites

S. C. ——— Br. Resummons, pl. 26. cites S. C.

6. Scire facias was sued in lieu of re-attachment after the plea was put *sine die* by demise of the king; and this for the defendant to have judgment. Br. Scire facias, pl. 182.

S. P. Br. Resummons pl. 26. cites 10 E. 4. 15.

That he shall have scire facias for the mischief, to have return: and so in *quare impedit*; for each is become actor against the other. Brooke says, and so it seems, that where the defendant is become actor, or is in a case to recover nothing against the plaintiff, that he shall have scire facias in this case.

7. In *account*, if the defendant is awarded to account, and after the king dies, and the *parol* is without day, the plaintiff shall have scire facias, and habeas corpora against the jurors, to revive the issue which was joined before the demise of the king. Br. Scire facias, pl. 197. cites 1 H. 7. 1.

(D) Lies for what.

1. SCIRE facias was brought where the plaintiff had distrained for rent, and made avowry, and had judgment to have return in the replevin, and the arreages were 40l. of which he brought scire facias to have execution; and because the judgment is no more but to have return, and not to recover any rent, therefore by award he took nothing by his writ. Br. Scire facias, pl. 99. cites 21 E. 3. 21. *[283]

2. In *trespass* the defendant was condemned, and capias ad satisfaciendum awarded, and after exigent he rendered himself, and pleaded release of the plaintiff, and prayed scire facias ad cognoscendum factum, and had it: and it was said per Cur. that if the plaintiff be warned thereupon, *and does not come, the defendant shall go quit. Br. Scire facias, pl. 155. cites 22 Aff. 91.

He who is condemned in debt or damages, and has release, and capias ad satisfaciendum

is issued against him, yet if he be not ready he shall not have scire facias ad cognoscendum factum; for he shall not have scire facias, unless he be in person. Per Cur. Br. Scire facias, pl. 170. cites 2 E. 4. 24.

Br. Scire facias, pl. 2. 18. cites S. C. in a nota. —Br. Quare Impedit, pl. 30. cites 42 E. 3. 15. [but it should be 43 E. 3. 15. and so are the other editions.]

3. A man may have scire facias of an *advowson*, and also a *cofe*. *favit, &c. quære inde*; for *præcipe quod reddat* does not lie of an *advowson*, and yet it is permitted in common recoveries for *assurances*. Br. Scire facias, pl. 26, cites 43 E. 3. 15.

4. Scire facias lies upon offices found for the king, and against patentees of the king, and against the committee of the king, and against the occupiers of the lands. Br. Scire facias, pl. 227. cites 10 H. 4. 2. and Fitzh. Traverse 50.

5. Scire facias lies of common, or *corody* upon fines levied of them; per Ashton J. *quod non fuit contradictum* in nature of assise in fine. Br. Scire facias, pl. 171. cites 4 E. 4. 2.

Br. Surmise, pl. 28. cites S. C.

6. It was doubted where information is, that *J. S. is passing into another land with plate or money*, if scire facias shall issue against him, or not; and the best opinion was, that it shall not. Br. Scire facias, pl. 169. cites L. 5 E. 4. 1.

7. Where the jurors in appeal acquit the defendant, and the plaintiff is not sufficient to render damages, and finds abettors, *scire facias shall issue against the abettors* to render damages. Br. Scire facias, pl. 239. cites F. N. B. 114.

8. Scire facias to have livery out of the hands of the king, where one was found heir by one office, and another by another office. Br. Scire facias, pl. 239. cites F. N. B. 160, 161.

9. A writ of error was brought in the Exchequer-Chamber of a judgment in B. R. and the judgment was affirmed; a scire facias will not lie for *costs* without shewing, that the judgment was affirmed in Cam. Scacc. 8 Mod. 73, 74. Pasch. 8 Geo. 1723. Anon.

(E) Lies upon what Suggestion or Surmise.

1. IF a man leases land for life, the remainder over in fee, and the tenant for term of life dies, and a stranger intrudes, he in the remainder in fee may have scire facias; *quod nota*, upon naked matter in fact. Br. Scire facias, pl. 238. cites 6 E. 2. F. N. B. tit. Intrusion.

Brooke says, this seems to be by scire facias; for so is 11 H. 4.

2. If the demandant recovers in *formedon*, and after land descends where the ancestor warranted the land recovered before, there the tenant shall have process to recover the land descended after: per Finch. Br. Scire facias, pl. 17. cites 40 E. 3. 26.

21. Per Hank. And see 4 H. 6. 4. a difference where the demandant recovers, and where the plaintiff is barred, as in debt upon *riens enter mains* pleaded by executors, and the plaintiff is barred, and assets comes after, there he shall not have scire facias. Per Cur. For this judgment annuls the record, but in *formedon* judgment is for the demandant; therefore there remains a record. Note the difference. Br. Scire facias, pl. 17. cites 40 E. 3. 26.

It does not lie upon surmise only, but upon matter of record and surmise, it lies well; *quod nota*. Br. Scire facias, pl. 118. cites 14 H. 7. 7.

3. Scire facias shall lie upon matter of record and also upon suggestion upon matter certain, but not upon matter which is uncertain. Br. Scire facias, pl. 8. cites 27 H. 6. 7.

4. *In Chancery, if the heir surmises, that his mother has more in dower than she ought, he shall have scire facias upon this suggestion. Per Fortescue, &c. Br. Scire facias, pl. 8. cites 27 H. 6. 7.*

5. *And per Prisot. If the heir be vouched in dower in the same county, and the feme recovers against the heir, if he has, and if not against the tenant, and be over in value, she takes execution against the heir, and after this land is devested out of his possession by elder title; now she shall surmise this matter, and that the heir has no more by the same ancestor by descent within the same county, and pray scire facias against the first tenant, and shall have it upon this surmise and matter of record, as in the case of dower before. Br. Scire facias, pl. 8. cites 27 H. 6. 7..*

6. *So where a man has verdict or judgment, and after releases, the defendant shall have scire facias ad cognoscend' factum. Br. Scire facias, pl. 8. cites 27 H. 6. 7.*

7. *Where fully administered, in debt against executors, is found with them, and after assets comes to their hands, the plaintiff upon surmise shall have scire facias out of the first record to have execution of those goods. Br. Scire facias, pl. 12. cites 33 H. 6. 24.* Br. Executors, pl. 12. cites S. C.

(F) Brought in what Court, or out of what Court it shall issue. Sec(B) pl. 2.

1. **I**T was ordered, [*in Chancery*] that the plaintiff might take out scire facias against the defendant *for not paying of money according to an order*, in 12 & 13 Eliz. Li. A. fo. 162. Toth. 272. Broughton v. Vicecom' Bindon.

2. *The debtor being in execution in the Marshalsea upon a judgment in B. R. removed himself by habeas corpus into Chancery, and so was committed to the Fleet, and then got a forged release of the execution, and brought an audita querela, and a scire facias returnable in the court of Chancery. And Williams J. said, (to which the whole Court agreed) that there is no precedent that on a judgment in any of the king's courts an audita querela should lie and a scire facias thereupon returnable in Chancery, nor any where but only in the same court where the judgment was given, who best know the proceedings in the same cause; but otherwise, had the judgment been upon a recognizance, or on a statute merchant or staple; for in such case it might be returnable in Chancery, because the recognizance is before that Court, who are judges of it. 2 Bulst. 10. Mich. 10 Jac. Scriven v. Wright.* Bulst. 145. Trin. 9 Jac. S. C. but not S. P.

3. *Judgment was given in debt in the grand sessions in Wales against one who lived there, and died afterwards intestate. J. S. who dwelt in London, took out letters of administration. The question was, whether the record might be removed into the Chancery by certiorari, and sent from thence by mittimus into B. R. or C. B. in order to have a scire facias to make the lands in Wales, or goods in the hands of the administrator liable to the judgment there. And all the justices and barons being assembled conceived, that it could not; for scire facias lies in no court but where*

where the judgment was given. And otherwise all judgments in London and inferior corporations would be executed here, which would be very inconvenient to make lands or persons liable in other manner than they were at the time of the judgments. Cro. C. 34. pl. 7. Pasch. 2 Car. Anon.

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Sec (A) —
(H)

(G) Proceedings and Pleadings.

1. **I**N scire facias the defendant said, that the plaintiff was tenant of the tenements the day of the writ purchased, and yet is, judgment of the writ. And it was held a good plea, and not a nontenure; for the plaintiff cannot have execution against himself: and also if the plaintiff disseises the tenant, and now has execution, it will be hard for the tenant to have assise against the plaintiff, contrary to his judgment Br. Scire facias, pl. 137. cites 39 E. 3. 28.

Br. Process,
pl. 159. cites
S. C.

2. In scire facias of land, if the tenant makes default after appearance petit cape shall issue: and so it was admitted in a scire facias without question made. Br. Scire facias, pl. 230. cites 42 E. 3. 2.

3. In scire facias, if the sheriff returns that the party is warned, and does not come, execution shall be awarded; quod nota. Br. Scire facias, pl. 23. cites 43 E. 3. 13.

Where a
scire facias
was brought
to have exe-
cution of a
judgment in
assise, of
lands and
damages,
&c. the de-
fendant

4. Scire facias upon a recovery of land; the tenant said, that after the recovery the plaintiff entered; judgment if at another time execution ought he to have. Parle said he had nothing after the judgment; Prist, and the others econtra. Brooke says, and so it seems that the entry of him who recovers is good within the year, and after the year, and upon the heir of him who is in by descent from him who lost, and against his feoffee, if no release be made, &c. after the recovery, and before the entry. Br. Scire facias, pl. 52. cites 49 E. 2. 23.

pleaded an entry by the plaintiff into the land mesne between the verdict and the judgment, by which he was seised in his demesne, as of fee, &c. Judgment of the writ. Upon demurrer the opinion of the Court was, that it was no plea; but the reporter says, quære if the plea had been, and yet is seised, &c. which amounts to a nontenure. D. 227. pl. 48. Hill. 6 Eliz. Burlace v. Ward.

5. In scire facias against several tenants, if the writ be, that A. and T. entered into the manors of S. and D. and held them severally, it is ill: but if it be that A. entered into the manor of D. and T. into the manor of S. and held them severally, it is good, by judgment. Br. Brief, pl. 423. cites 11 H. 4. 15.

In scire fa-
cias by two,
the one
would not

6. Where two brings scire facias, and the one will not sue, summons ad sequendum simul shall issue, and not scire facias ad sequendum simul. Br. Process, pl. 38. cites 12 H. 4. 3.

sue; and it was held that process may be made by summons ad sequendum simul; and by some it shall be by scire facias ad sequendum simul; but the better party held that it shall be scire facias, and not by summons. Br. Process, pl. 108. cites 6 H. 7. 12.

7. A release of all actions is a good bar of scire facias. Co. Litt. 290. b.

8. So a release of executions is a good bar in a scire facias. Co. Litt. 290. b.

9. Upon a rule of Court to shew cause why a scire facias to revive a judgment, was not good, this was offered for cause, that it doth
not

not shew before whom the judgment was given, which was to be reviewed by the scire facias, and consequently there appears no judgment to warrant the scire facias. To this Roll J. answered, that in C. B. the course is to set forth before whom the judgment is given, but in B. R. the course is not so; but asked how the record comes hither? the counsel answered, that there was a judgment in Canterbury, and upon that a writ of error was brought in this court, and the judgment affirmed upon that writ of error, and then a scire facias issued out here upon the judgment against the bail, and upon this the bail moves upon the record, that there is error in the scire facias. Roll. J. said, the record is well enough; in a scire facias it is not requisite to say *consideratum est per curiam*; therefore let the scire facias stand. Sty. 72. Mich. 23 Car. B. R. Cheever's case.

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10. It is the constant practice of B. R. to sue both the scire facias's at once, in regard that there ought to be a full time between the date of the 2d scire facias, and the return of it; and in C. B. there is but one scire facias, except in the case of an executor. Skin. 633. Hill. 7 W. 3. B. R. Barney v. Hardisty. 2 Salk. 599. pl. 4. Trin. 8 W. 3. Anon. takes notice of this practice in B. R. that two scire facias's and two nihil's, are returned, and that heretofore both were sued out together by making the teste of the second, as if the first were returned; but now the Court made a rule that both should not be sued out together, but the first should be duly returned before the second should be sued out, and that the second should be tested the day of the return of the first.

11. Where a scire facias is brought in B. R. upon a judgment in an inferior court, it must appear in the writ itself how the judgment came into B. R. (viz.) whether by certiorari, or by writ of error, because the execution is different; for if it came in by certiorari, the scire facias must set forth the limits of the inferior jurisdiction, and pray execution within those particular limits, and also that the judgment came in by certiorari; but if it came in by writ of error, that must be shewn in the scire facias itself likewise, and pray execution generally. 3 Salk. 320. pl. 5. Pasch. 9 W. 3. B. R. Guillam v. Hardisty. Ld. Raym. Rep. 216. Guillam v. Hardy, S. C. accordingly, the second resolution there.

12. And whereas the scire facias in the principle case recited the judgment in the inferior court *sicut per inspectionem recordi nobis constat* it was for that reason ill; for it ought to be *sicut patet per recordum*, because if the defendant should plead nul tiel record, it must be tried by the record itself, and not by inspection: so this scire facias was quashed. Per Holt Ch. Just. and the Court. 3 Salk. 320. pl. 5. Guillam v. Hardisty. Ld. Raym. Rep. 216. S. C. accordingly, the third resolution.—Carth. 391. Mich. 8 W. 3. B. R. Gillam v.

Harnage, S. C. And it was error of a judgment in the court of Marshalsea, and afterwards a scire facias was brought against the bail, wherein it was recited that the judgment was in the Marshalsea court, *quod quidem recordum certis de causis coram nobis venire fecimus*; and upon motion this writ was quashed, because by the form of it, viz. *certis de causis*, the record was removed by certiorari, and they shall not make use of this court to execute the judgments of other courts, unless they are affirmed there on a writ of error; wherefore the plaintiff brought a new writ of scire facias, although the writ was, that the record came hither by writ of error, but then the scire facias should recite thus, (viz.) *quod quidem recordum coram nobis causa erroris corrigend. venire fecimus*.

13. Judgment against several defendants, and a capias and a cepi corpus returned as to one; then another of defendants dies, and he that was in execution escaped, and a scire facias against the survivor, the tertenants of the deceased, and him that had escaped: and per Cur. It may well be; but first the scire facias ought to suggest that he had escaped. And 2dly, it ought to be *de terris & tenementis* of the tertenants

tertenants of the deceased, and de terris & tenementis & bonis & catallis of the survivors. 12 Mod. 254. Mich. 10 W. 3. Anon.

14. There is this *diversity* between a scire facias upon judgment in debt, and in ejectment; for in the last the party may controvert the original title. Per Cur. 12 Mod 499. Pasch. 13. W. 3. Anon. cites it as in the case of Proctor v. Johnson.

15. It was moved to haveoyer of a scire facias; but it appearing that it was taken out to assign errors; the Court said they do grant this motion in scire facias's against bail, and to revive a judgment, but here they could not do it. Barnard Rep. in B. R. 98. Mich. 2 Geo. 2. 1728. Fuller v. Barnes.

[287] 16. On motion for the master's report of the irregularity of a scire facias upon a judgment, he said the case was, that an *executrix* who was the defendant, gave a letter of attorney to confess a judgment to the plaintiff; this judgment was accordingly signed, but never entered on record; yet afterwards the defendant pleaded it in bar of another action. And now a scire facias being taken upon it, the question was, whether it was regular? Mr. Fazakerly objected, that it was; for the Court has a power to give the plaintiff leave to enter it up nunc pro tunc; and he said they would do that, because the defendant has already taken advantage of it. But the Court observed, that the present matter before them was only the irregularity of this scire facias: and clearly it is so, because there is no judgment on record to found it upon. Accordingly the judgment on the scire facias was set aside. Barnard Rep. in B. R. 133, 134. Hill. 2 Geo. 2. 1728. Dale v. Rusted, cites 5 Mod. 88.

(H) Returns good. In respect of the Time.

1. **I**N scire facias against the bail, it was agreed by the Court and clerks, that by the course of the court there ought to be 14 days between the teste of the 1st scire facias, and the return of the 2d, (viz.) 7 days between the teste and return of each, and that the scire facias ought to be 4 days at least in the hands of the sheriff before the return thereof; but in the principal case, the return of the first writ being *die sabbati post crast. animarum*, between which day and the return of the 2d writ there were not 7 days, the Court declared they were not obliged to consult the almanack to know it; for it may be that 7 days in some year may be between them, and that to retard execution this shall not be inquired; but if before the return of the 2d scire facias it had been moved to shew the truth, the Court would have the regularity thereof examined. And in this case the plea of the defendant, that the principal died before any scire facias issued against the bail, was held so insufficient that the defendant's counsel did not offer to maintain it; and judgment was given for the plaintiff. 2 Jo. 228. Mich. 34 Car. 2. B. R. Levingston v. Stoner.

It being objected that a scire facias

2. After a writ of error brought on a judgment in C. B. there was a *sci. fac. teste 28 Novemb. returnable die veneris proxime post Octab.*

Octab. Janēi Hillarii ubicunque tunc fuerimus in anglia, to shew grounded
cause quare executionem non haberet; to which the defendant de- upon a judg-
murred, and it was held, that such writs of sci. fac. were made ment in an
returnable sometimes at a day certain, and sometimes upon com- assise, which
mon days; but that this writ returnable on a day certain ubicun- is an original,
que, &c. was naught, for it ought to be returnable on a common day, ought to have
if it be coram nobis ubicunque, &c. 3 Salk. 320. pl. 4. Hill. 2 & 3 been return-
 W. & M. in C. B. Manning v. Bois. able *ubicun-*
 this was re-
 turnable at

a day certain, Holt Ch. J. said, it is good the one way or the other. Judgment for the plaintiff.
 2 Ld. Raym. Rep. 853, 854. Pasch. 2 Ann. West v. Sutton.

3. It was adjudged that in a scire facias it is sufficient that there be 15 days inclusive between the teste of the writ of the first scire facias, and the return of the second. 12 Mod. 215. Mich. 10 W. 3. Carth. 468.
 Goodwin v. Beakbane. S. C. the 1st writ was taken out and tested Octob. 24.

returnable 31 Oct. and an alias scire facias was taken out teste on the 31st of Oct. (the day of return of the first writ) returnable 7 Nov. It was objected that there were not 15 days exclusive of the very days of the teste and return; but the whole Court held the writs good; for there are 8 days between the teste and return of each, and the second writ must bear teste on the day whereon the first was returnable, and consequently that day must be reckoned twice. Besides, no manner of objection can be made to the writs singly; so that if each is good as it stands alone, the putting them together * shall not make them irregular by a joint computation of time, and judgment for the plaintiff. — 2 Salk. 599. pl. 7. S. C. by the name of Goodwin v. Peek accordingly, and says the practisers agreed it to be so. — Comyns's Rep. 53. pl. 35. Goodwin v. Bearbank S. C. accordingly.

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4. Two scire facias's were taken out at one and the same time with the same teste, and one returnable quinden' Hill. and the other crastino Purif. Per Cur. though there were different returns, and at a convenient distance, yet it was wrong, because the defendant by this means would lose the benefit of 2 scire facias's, which the law gives him. 6 Mod. 86. Mich. 2 Ann. B. R. Jevon v. Turner.

5. It was moved to quash a scire facias *quare executionem non, &c. sued by the defendant in error* to make the plaintiff assign his errors; because the original suit in C. B. was by bill of privilege, and the scire facias therefore ought to be returnable at a day certain, but this was made returnable upon a common return. And of that opinion was the Court, because scire facias's ought to be made returnable according to the nature of the original suit below in C. B. and Trin. 11 Ann. between DAVISON AND PARKER, it was adjudged so by the court of B. R. in the very same case. And the writ of error was quashed. 2 Ld. Raym. Rep. 141. Easter 12 Geo. B. R. Eden v. Wills.

(I) Return. Good. And Peremptory, in what Cases,

1. SCIRE facias against two, of certain land, the sheriff returned the one warned, and the other nihil; and the plaintiff prayed execution at his peril against him who is returned nihil. Per Shard, you shall have execution at your peril upon such return in

in scire facias upon *debt or trespass, contra* in scire facias upon *frank-tenement*; for there he may be warned in the land of which execution is sued, by which [he awarded him to] sue writ to warn the other, quod nota. Br. Scire facias, pl. 124. cites 24 E. 3. 25.

2. Scire facias was returned by J. N. and W. S. and did not say *probos & legales homines*; and the defendant appeared and took exception, et non allocatur. Br. Process, pl. 59. cites 8 H. 6. 27.

3. In *audita querela* against two, where the one has released, and both sue execution and scire facias thereupon, and at the day the one of the conusees makes default, this is the default of both, and the plaintiff shall recover damages. Br. Scire facias, pl. 183. cites 11 E. 4. 8. and cites tit. Damages 125. That by the first return of scire facias the plaintiff shall have judgment, and so always upon scire feci returned as it seems, but otherwise it is of nihil; for sometimes there shall be 2 nihils, and sometimes but one nihil. Br. Scire facias, pl. 183.

It was moved to make a rule absolute for quashing a scire facias to revive a judgment,

4. A scire facias upon a record in B. R. where the action is brought by original, must alledge a place where the court was held, because it is ambulatory, and the writs returnable there, are coram nobis ubicunque tunc fuerimus, &c. but 'tis otherwise upon records in C. B. because that court is confined to a certain place by magna charta. Vent. 46. Mich. 21 Car. 2. B. R. Glinn v. Smith.

the exception took to it was, that it was returnable coram nobis, without saying *ubicunque*, or so much as *apud Westm.* The Court said, they thought the coram nobis might supply the *ubicunque*; but not the other fault, and accordingly made the rule absolute. Barnard Rep. in B. R. 327. Pasch. 3 Geo. 2. 1730. Baynes v. Forrest. cites Sid. 80, 81. 1 Vent. 46.

For more of Scire facias in general, See Bail, Execution, Fines, Prerogative, Releaser, and other proper Titles.

(A) How considered, and Cases relating to their Transactions in their Business.

1. SCRIVENER is *not* a profession of such estimation in law as to maintain an action on such words said of him as of an attorney, &c. agreed by all. 2 Roll. Rep. 92. Trin. Jac. B. R. in the case of Brett v. Trevillian.

2. One Glover [a scrivener] having the putting out of the defendant's money, to whom the plaintiff paid the money again at the

the day; because the money was not paid to the defendant, and the scrivener breaking, the defendant puts the bond in suit; *ordered to cancel the bond.* Toth. 273. cites Huet v. De la Fontaine. Hill. 20 Jac. li. B. fol. 464.

3. Nota, per Keeling Ch. J. et Curiam, that if *one trusts a scrivener to take security, and he after refuses to deliver it up, and receives the money*, he does it without warrant; and if he dies the creditor may sue the obligor, after the death of the scrivener; ex *motione Finch*, to set aside warrant of attorney, so obtained by one Yarway. 2 Keb. 249. pl. 25. Trin. 19 Car. 2. B. R. Hicks v. Logging.

4. One had *carried writings to one P. a scrivener, and among them was a deed which mainly concerned the house P. lived in*; he re-delivered all the other writings; but as to that, he said, he held his house by it, &c. But per Cur. he being one over whom they had a power as a maker of deeds, &c. would not let him keep what he was *intrusted with in the way of his profession*, but made him put the party in the same condition as he was at first, and then he might recover the deed by law. Skin. 1. cites Mich. 21 Car. 2. B. R. Parry's case.

Vent. 466 S. C. accordingly, but there the deeds are mentioned to be first laid before counsel, and by him delivered to a scrivener

by consent of the parties, and that the deed not delivered back concerned a 3d person, and to whom the scrivener delivered it, which the Court thought an abuse of his practice.

5. So likewise was it done in Ld. Ch. J. Hale's time in a case of the like nature. Skin. 1. cites Doble's case.

6. *A. possessed of certain valuable goods, put them into the hands of B. an upholsterer, to sell them for him, but wanting money applied to C. a scrivener to lend him 500l. on the goods, which C. did upon B's informing him of the value of them. After A. borrowed 100l. more, and gave a judgment also for the debt with interest, the goods being still in B's hands. B. sold the goods at an undervalue, but whether with the privity of C. or D. (whose money it was supposed to be) did not appear. But A. being dead, B. desired J. S. the executor of A. to sell them, which he refused to do unless he might first see them, which he could not. The securities were made in D's name, but he did not appear in the transacting the affair. The securities were always in C's custody, and by him delivered to J. S. who paid C. the money secured. But the goods being sold J. S. could not have them, and therefore sued B. C. and D. to have the goods or the value, which was found to be 800l. And Ld. Chancellor decreed the defendants to pay the money; and held, that B. became trustee for C. and that C. is answerable for B. who sold them, and that as to C. and D. they are to be looked upon to be as one person as to the plaintiff in case.* 2 Chan. Cases 226, 227. Hill. 28 & 29 Car. 2. Perkins v. Avery, Brown, and Baker.

7. Scrivener is *not privileged against examination* of what came to his knowledge as scrivener, and his demurrer was over-ruled, and decreed to answer as to what conveyances himself made. Chan. Cases 242, 243. Hill. 29 & 30 Car. 2. Atterbury v. Hawkins, &c.

[290] A bill was brought to discover the deeds of several lands and whether they were not made in trust, and whether the debt demanded by the plaintiff, was not mentioned in a schedule

they were not made in trust, and whether the debt demanded by the plaintiff, was not mentioned in a schedule

sebedule thereunto annexed. The defendant pleaded, that he was a scrivener by profession, and *hath* taken the accustomed oath that scriveners do before they are made free in London, whereby he is obliged not to discover the secrets of those persons' business that employ him in that trade without their leave; and that he was employed by and assisted Sir J. Langham in the purchasing of the said lands, and that he drew the writings concerning the premises, and has the keeping thereof by the said Sir John's direction, and so ought not to discover the said writings, contrary to his trust, nor any thing relating to this matter. The Court declared that the oath of a scrivener does not oblige from a discovery, more than the oath of any other freeman of London. And if it had been in the case of a counsellor at law, the said plea had been insufficient in this case; and over-ruled the plea, saving he is not to answer to whom he paid the purchase money. 2 Chan. Rep. 29, 30. 21 Car. 2. fol. 360. *Shalmer v. Tresham.*

An attorney having drawn an agreement between a sheriff and his under-sheriff, and being produced at nisi prius, to prove a corrupt agreement between them, he was not compelled to discover the matter, though he was not a counsellor; and Holt Ch. J. said the law seemed to be the same of a scrivener. And he cited a case where, upon a covenant to convey as counsel shall advise, and *consilium non dedit* advisamentum being pleaded, conveyances made by the advice of a scrivener, being tendered and refused, was allowed to be good evidence upon this issue; for he is a counsel to a man, who will advise with him if he be instructed and educated in such way of practice; otherwise of a gentleman, parson, &c. Skin. 404. pl. 40. Mich. 5 W. & M. B. R. Anon.

See pl. 4, 5. 8. A. bought lands of B. and had possession, and the evidences delivered him, which he carried to C. for advice. C. pretends the covenants were too general, but after buys the land himself. A. who was the first purchaser, moved, that C. might re-deliver to him the writings he had of him, and put him in the same posture he was. Vide Skin. 1. Mich. 33 Car. 2. B. R. *Davy v. Tiack.*

9. A. the father of B. the plaintiff, applied himself to the defendant, *Clerke, a scrivener*, to borrow 200l. and upon the lending thereof B. was bound as surety to A. his father, in 2 bonds, for the payment of it, viz. in one bond for E. and in another to F. the money belonging to them. *Clerke had the ordering and disposing of the monies, and from time to time received the interest due upon the bonds.* Afterwards A. became insolvent; and by reason of the debts for which B. stood engaged for his father, B. failed likewise. A. having compounded with his other creditors for 7s. in the pound, he and B. applied to Clerke to know where E. & F. lived; who only told them, that they need not go to them, but that what agreement they made with him E. & F. would stand to; upon which they agreed with him for 10s. in the pound, 70l. to be paid immediately; which was done, and 30l. in a short time, which was tendered. B. the plaintiff, brought his bill against E. and Clerke to have the bonds delivered up to be cancelled, or that he may be indemnified against them. The Court decreed the plaintiff to pay E. what was due for principal, interest, and costs; and Clerke to repay what B. should so pay to E. and to indemnify the plaintiff according to his agreement. 2 Vern. 127. pl. 126. Hill. 1690. *Parrot v. Wells and Clerke.*

19. Scrivener lends 100l. of A's money to B. and takes bond and warrant of attorney to confess judgment in A's name, and keeps the bond, but gives A. the copy of the judgment, and after receives the money, and delivers up the bond, whether B. must pay the money over again? *quære.* 2 Vern. 265. pl. 250. Pasch. 1692. *Stafford v. Southwick.*

11. A bond for 1400l. was entered into to B. a scrivener, in trust for A. the plaintiff. B. having occasion for money, without the privity of A. borrows it of J. S. and assigns this bond to J. S. for security,

security, J. S. having *no notice of the trust*, and there being nothing of the trust appearing by the bond: and the question was, which of them should have the *benefit of the bond? it was agreed, that *if it had been a mortgage*, and it had been *assigned to J. S. without notice* of the trust, that J. S. should have had it, because there a legal estate had been vested in him without notice; but this case, as was insisted, differed from that; because, by the assignment of a bond nothing passes at law but an equitable right, which is rebutted by the prior equity in A. And so it was said, it was held in the case of Sir EDWARD ABNEY, by the lord chancellor. But the master of the Rolls was of opinion in this case, that J. S. should have it; but Sir Edward Abney's case being cited to be in the very point, he desired to see that case before he would give any opinion. He said, it is a standing rule here, that if I trust a scrivener with my bond, and the obligor pays him the money and takes up the bond, that I shall have no remedy against the obligor; but if the *obligor compounds with the scrivener for less than is due*, it is an evidence of fraud; and then, it may be, the obligor may pay the money again. 2 Freem. Rep. 214, 215. pl. 287. Pasch. 1697. In Curia Cancellariæ. Penn v. Brown & al'.

12. If a scrivener or an attorney, with whom money is lodged to be placed out on security generally, *puts out his client's money* without the privity of his client, *upon a defective security*, and which he might easily have informed himself to have been so, yet Ld. Keeper Wright said, though he did not think their so doing is altogether agreeable to what, in natural justice they ought to have done, yet there was no foundation to charge them in equity: and dismissed the bill with costs. And this decree was afterwards affirmed in the House of Lords. Chan. Prec. 146. Hill. 1700. Luke v. Bridges and Christy.

A. deposited 300l. in B. a scrivener's hand; B. placed the same out in A's name, upon a mortgage which proved defective. A. for many years received the

interest. It did not appear whether A. ever assented to this mortgage, or that he gave B. a general authority to place it out at interest as B. thought fit, or that he laid any restraint upon B. not to dispose of it without his approbation. But in the receipts given by A. he took notice of the principal being in mortgage upon the said security, which the lord chancellor thought was an approbation of the security; and so was of opinion that A. ought to sustain the loss, and reversed a decree made at the Rolls to the contrary. But had it stood barely upon the construction of the law, without any proof of the consent or approbation of A. there B. must have bore the loss according to the rules of law in case of bailment. 2 Freem. Rep. pl. 53. Hill. 1729. Clarke v. Perrier.

13. A scrivener had notice of declarations in ejectment delivered on a prior mortgage before he lent his client's money, yet he could not be charged to make good the money he afterwards lent upon it. Cited by Ld. Keeper Wright. Chan. Prec. 149. in the case of Luke v. Bridges and Christy, as Sir John Foach's case.

14. A. had 4700l. per ann. granted to her and her heirs out of the excise or customs, and wanting to borrow money, B. who was gentleman of her horse, procured the same of one C. a scrivener, who was employed to let out money for D. and gave him 100l. for procuration; the security given for it was out of this 4700l. per ann. a proportion whereof was set apart, to be yearly applied towards this debt, till the whole principal and interest was discharged. C. had received 2900l. for the use of D. and gave his receipts accordingly, and had accounted to D. for above 1700l. but about 1100l.

1100*l.* remained in his hands unaccounted for, and he died insolvent: and the only question was, whether this loss should fall upon A. or D.? and it appearing, that C. was agent for D. in other affairs likewise, and *transacted this matter* on their behalfs, *saw [saw] the writings executed, and paid the money lent, and the money was appointed to be paid at his house, and the writings being left with him, and for whatever appeared continued at his house,* the Lord Keeper and Master of the Rolls were both of opinion, that the loss ought to fall upon D. and not upon A. who seems to have
 [292] been an utter stranger to C. before the borrowing this money. And the Master of the Rolls took the *distinction*, which, he said, had always been allowed, that *if a bond be left* with a scrivener, that is sufficient for him to receive the principal and interest, and the delivery up of the bond is a sufficient discharge to him that pays it; but *if a mortgage* was left with a scrivener, this is a sufficient authority to him to receive the interest, but not the principal; and the delivery up of the mortgage by him is no sufficient discharge to the mortgagor: because the estate ought to be re-assigned, which cannot be done but by the party himself. But the Lord Keeper said, he saw no reason for this difference, but *that in equity it would be all one*, the money being really paid to the person who had the deeds in his custody; but the Master of the Rolls seemed to be of a contrary opinion. But, however, *here the money was to be paid by instalments*, principal and interest together; and it was plain he had accounted for part to D. and no countermand had ever been given; and therefore thought it reasonable that what was paid to C. should be allowed to A. on account, her bill being to redeem. 2 Freem. Rep. 249, 250. pl. 317. Trin. 1701. in Curia Canc. The Dutchess of Cleveland v. the Executors of George Dashwood.

15. A. borrowed 100*l.* of B. upon bond, which money was procured by C. a scrivener: *when the bond was sealed it was delivered to the obligee. A. paid several years interest to C. the scrivener, and 50*l.* part of the principal money, which the scrivener paid to the obligee, but the last 50*l.* of the principal money being paid to the scrivener, he broke before he paid it to the obligee.* And the question was, whether A. the plaintiff was to lose the money, or the obligee? And the Master of the Rolls said, that it was the constant rule of this court, that if the party, to whom the security was made, trusted his security in the hands of the scrivener, such payment to the scrivener was good payment; but if he took the security into his own keeping, payment to the scrivener would not be good payment, unless it could be proved, that the scrivener had authority from the party to receive it; and although in this case the scrivener had received the interest and part of the principal, and paid it to the obligee, yet that did not imply that he had any authority to receive it; but as long as he paid it over, all was well, and any one else might have carried it to the party as well as he; and A. not proving, that the scrivener had any authority from the obligee to receive, he was forced to pay the last 50*l.* again, although the Master of the Rolls declared, that he
 thought

thought it a very hard case. 2 Freem. Rep. 289, 290. pl. 359. Mich. 1705. in Curia Canc. Sir John Wolstenholm v. Davies.

For more of *Scribener* in general, see *Payment* and other proper Titles.

Search for the King.

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1. 24 Edw. 3. **W**HEREAS before this time, in case that cap. 14. a man has demanded, by petition in the parliament, certain lands and tenements which be in the king's hands, and to the same petitions has been answered in the same Parliament, Chancery or B. R. that the king wills that a writ be sued to the treasurer and chamberlains of the Exchequer to search charters, muniments, and other remembrances which may him avail, whereby he may be advised to make answer;

To which writs the treasurer and chamberlains commonly have answered, that they have searched, but did not search; and would not answer, that they have fully searched and nothing found, nor that they can no more find but that which they have sent; whereby, according to the law afore this time used, a man has not had cause to put them which be for the king to answer; and in such manner the demandant have been greatly delayed to their mischief:

Wherefore it is assented, that after that the four writs be returned, whether the muniment or remembrance be found for the king or not, that then in the Parliament, Chancery, or in B. R. or in C. B. they which shall sue for the king shall be put to answer, and to defend the lands and tenements so demanded against the king, to the best that they can or may, according to law; so always that every of the 4 writs be delivered to the treasurer and to the chamberlains 40 days before the day of the return.

2. In every case where the king, being party, may be at a loss, writ of search shall issue; as in præcipe quod reddat, or other real action against his lessee, who prays in aid of him; but not in personal actions, because there he shall lose nothing. Fin. Law, 177. 2.

3. The form of the writ is, rex Thesaurar' & Camerar' suis sal. mandamus vobis quod scrutatis rotulis, memorand', cartis, evidentiis, & aliis munimentis (talem terram tangen') in Thesaurar' nostro nunc sub custodia vestra existen', de eo quod inde inveneritis,

ritis, nos in cancellaria nostra in 15 Paschæ ubicunque tunc fuerimus, sub sigillo Scaccarii distincte & aperte reddatis certiores, &c. Fin. Law, 77. b.

4. One sued by petition to the king, because *J. S. disseised him, which J. S. was attaint of treason, whereby the lands came to the hands of the king*: and the king indorsed the petition, and sent it to the Chancellor to do right and law; and he wrote to the Exchequer to search in the Treasury among the charters of J. S. if they found any thing of this matter; who certified, that they found nothing. Br. Search pur le Roy, pl. 2. cites 24 E. 3.

5. *Warranty was pleaded against the king from his ancestor, whose heir he is, and assets descended in fee simple to bar him of a reversion after the death of his tenant in tail.* In this case search was granted, which found land descended in fee as above; and thereupon the king was barred. Br. Serche pur, &c. pl. 5. cites 45 Ass. 6.

Staunf. de Prærog. Regis, 73. b. 74. a. cap. 22. cites
6. Search shall not be made for the king, unless where a man ought to sue for the king by petition. Fitz. Tit. Petition, pl. 6. cites 7 H. 5. Per Skrene in Chancery.

S. C. ——— S. P. But it shall be as well where petition is sued in parliament, as elsewhere, and though the king has granted the land over. Fin. Law. 77. b.

[294] 7. Suit was made to the king by petition, supposing that the king had no title but by the forfeiture of *W. N.* whereupon *scire facias* was awarded against the king's patentee, and the matter was long delayed by aid prayer, and the plaintiff prayed a procedendo, and the patentee prayed search for the king. And by 5, he shall not have search; for the search is only for assuring the king of his title and right, whereas in this case the same is contained in the petition, and therefore he needs not any search; for if he has other title, the search will not avail the plaintiff: but 4 others held contra, and that where the king is by way of action or demand, as in formendon, &c. Search does not lie; for the king shall not make other title than what is comprized in the writ and declaration; but otherwise here, because the petition is the action of the party against the king, and the king is by way of defence; and therefore it may be that the king has other title, as by release after, &c. and therefore he shall have search. Quære; for it is not adjudged. Br. Serche pur, &c. pl. 6. cites 16 E. 4. 6.

Note, that in every petition where the king has granted the land over to another, a *scire facias* must be awarded against the patentee, like as it shall be where a traverse or monstrans de droit is tendered, which patentee, if he have not the whole fee-simple, but that there is a reversion in the king, or that the king is bound to warranty when he appears upon the *scire facias*, he may pray a writ of search to be awarded into the Treasury, to search what they can find for the king's title, as appears in H. 9. E. 4. fol. 51. where Sotile says, that every petition must make mention of all the king's title; for if it be found by the writ of search that any be omitted, the petition shall abate, and the reason of it is, because if on this suit of petition the king takes issue with the party which is found against him, his highness then shall be concluded for ever to claim by any of the points contained in the said petition; and herewith agrees the book T. 16 E. 4. fol. 6. Staunf. De Prærog. Regis, 73. b. cap. 22.

8. If the king be not intitled by any matter of record, but without any title enters into my land, whereby I sue unto his highness by petition, in this case no search shall be granted, because no title can

can be intended for the king in such case. Staunf. de Prærog. Regis, 74. a. cap. 22. cites T. 16 E. 4. 6.

9. It was found by office, that the *Duke of E. was seised of the manor of E. and that the king is heir, and came the Earl of L. and made petition to the king, because the duke disseised him, and process continued till he had restitution, and after he gave it to E. in tail. And afterwards by another office it was found, that the Duke of E. died seised of 40 acres of land, 20 acres of meadow, and 10s. rent in E. P. and T. whereupon the king seised, and granted it to M. And came the said E. donee in tail, and shewed all the former matter, and said that the land, meadow, and rent is parcel of the manor whereof restitution was made, and prayed restitution; and thereupon scire facias issued against the patentee, who came and prayed writ of search, &c.* Sotell said, that search ought to be granted to inform the king of his title, and that the statute which gives travers where none was at common law but petition, does not take away the search, which was upon petition at the common law, but in action personal, as in * *trespass*, the defendant said the king leased to him for years, and prayed aid of the king, there he shall not have search; for if it be found against the king after proceeding, the king shall lose nothing, because after the term ended he may enter: but where an incumbent, who is in of the presentation of the king, has aid of the king, he shall have search. Brian said, that search shall not be granted but where the king's title is by matter of record, whereof it may be intended that record may be found in the Treasury to maintain it; but that here the matter is upon matter in fact, viz. *Whether the land lost, and rent, be parcel of the manor, or not?* whereof nothing can be in the Treasury to specify it, &c. And that if the 2d office had been as the 1st was of the manor, so that it might be intended one and the same thing, thereupon the monstans de droit the tenant party shall have restitution without search; for the right was found before, and therefore shall not be tried again; and if it be found that † *J. S. held of the king, and died without heir*, and that the king is lord, there if I say that he had heir W. who entered and infeoffed me, absque hoc that he died without heir, there no search shall be, causa qua supra; but if I make title, as above, and traverse the tenure, there search shall be granted; for as to the tenure, record may be in the Treasury, &c. Catesby said, that search may be granted upon matter in fact; for where the king is intitled by attainder, and it is alleged that the party attainted had nothing in the land at the time of the attainder, yet search shall be granted, notwithstanding this is but matter in fact. And in formedon, a man says that the king granted him a manor, whereof the land is parcel, for his life, and prayed aid, he shall have search. Billing agreed to the case of the attainder, because the title of the king is founded upon matter of record and matter in fact. And if the king seised of land in jure coronæ grants it for life, in this case if the tenant has aid by reason of the reversion, search shall be granted; for the king may have evidence thereof in his Treasury: but where the king has reversion by purchase, and the tenant has aid, there search shall not be

* S. P. Per Fitzh. J. clearly, quod non negatur. Br. Serch: pur, &c. p. 1. cites 27 H. 8. 28.—S. P. Fin. Law 77. 2.

† S. P. Fin. Law, 77.

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† S. P. Fin
Law, 77.

granted; and he said he saw 2 judgments according to this diversity; and in *petition and aid of the king the king himself is party, but in this suit against patentee, the patentee only is party.* Pigot said, that where it can be intended that no matter can be in the Treasury, and this upon title by matter in fact, no search shall be granted; but contra upon title by matter in fact, where it may be intended that there is evidence in the Treasury of it; and agreed the case of the *escheat*, that no search shall be; and the same law, that no matter can be there to prove that *J. S. † aliened in Mortmain*: but upon tenure search shall be granted; and in the principal case it might be that the land was severed from the manor by deed, and therefore search is requisite; and it might be that it was tried by recovery, that it was not parcel, which record remains in the Treasury; and therefore because the patentee cannot have aid of the king, it is reason that he have search: and per Pigot, he *shall not be compelled to plead first, and pray search after, but shall have search first.* Spilman said, that upon petition search is due and usual; but contrary upon *monstrans de droit*, as here; & sic adjournatur: ideo quære. But the best opinion seems to be, that he shall not have search. Br. Serche pur, &c. pl. 3. cites 9 E. 4. 51.

10. In *assise of an office*, where the defendant prayed aid of the king by patent of the king of the office, by the words *concessimus*, he shall have aid of the king, by the words of the statute de bigamis [4 E. 1. cap. 1. &c.] but shall not have search. Br. Serche pur, &c. pl. 4. cites 2 H. 7. 7. a nota by the Reporter; quod non negatur.

* S. P. Fin
Law, 77. c.

11. In * *ejectment*, the defendant lessee for years prayed aid of the queen, because the reversion came to her by the attainder of the lessor, and the aid was granted. And in Chancery he prayed search for him and the queen; and after hearing the counsel, the justices were of opinion that no search was to be granted, because *no damage would accrue to the queen, though the plaintiff should recover*; besides, it is not grantable in any action but in petition of right, &c. viz. where one as adversary to the title of the queen, impleads her, and her title is not known. And cites the statute 14 E. 3. cap. 13. And no precedent was ever known that search was ever granted upon such aid prayer. D. 320. a. pl. 18. Mich. 14 & 15 Eliz. Grey v. Baude Lessee of the late Earl of Northumberland.

For more of Search for the King in general, see Aid of the King, Prerogative, and other proper Titles.

Seats in a Church.

(A) Actions and Pleadings.

1. **TRESPASS** *quare vi & armis sedulam suam fregit & asportavit*; the defendant said that the seat was in the church of D. of which J. N. was parson, and he by his command, &c. Elliot said this is no plea; for seat is a chattle, and not parcel of the franktenement: but Butler contra; for it is fixed to the franktenement, therefore parcel, as furnace fixed, &c. Per Fairfax, neither furnace nor fatts are parcel, nor booths in a fair, nor tables dormant. Per Hussey, it seems that seats in a church is a spiritual matter, and shall be ordered by the ordinary, and every one may remove the seat for their ease, if he, &c. had had it there by prescription. Br. Chattles, pl. 11. cites 8 H. 7. 12.

2. In case, the plaintiff declared that he was seised of a capital messuage, (but did not say an ancient messuage) and of lands in P. occupied therewith, of 100l. a year, and that time out of mind there was, and yet is within the parish church of P. a little chapel on the north-side of the chancel, called the parson's chancel, parcel of the said church, and that the plaintiff and all those whose estate, &c. have used to repair the said chancel and the seats therein, and to have seats there, and to bury the persons dying in the said messuage, and that no other have used to sit or be buried there without their leave; and that the defendant præmissorum non ignarus, maliciously hindered him to sit there, &c. from 5 July, &c. The defendant pleaded that the Earl of N. the aforesaid 5th of July, & semper postea, was seised in fee of the honour of P. and that the said chapel was parcel of the said honour; and that he the said 5 July, &c. as servant to the earl, and resident within the said honour, did sit there by his command. It was demurred to this plea. 1st, Because it is alleged to be parcel of the church, and if so, then it cannot be parcel of the honour, and so the substance of the declaration is not answered. 2dly, Because the declaration supposes a total disturbance from entering into and sitting in the said chancel, which is not answered by this plea: and the Court was of this opinion. Then exception was taken to the declaration, because plaintiff prescribes to have that liberty appertaining to his house, and did not shew it to be an ancient house. Sed non allocatur. And the Court said, that when it is supposed he is seised in fee of a capital messuage, and that time out of mind he had such a privilege appertaining thereto, it is therein included that it is in an

Bridg. 4. Dawtree v. Dec, S. C. accordingly; and all the judges agreed that the plea in bar was utterly insufficient; for one cannot have the freehold of a church, or any part thereof. And judgment for the plaintiff. — a Roll. Rep. 139. S. C. Hill. 17 Jac. B. R. but there the action being laid to be vi & armis, Moun- tague Ch. J. Doderidge and Haughton J. (Croke J. being dead) held that this ac-

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not lie;
and Moun-
tague took
a difference
between an
interest and

ancient messuage, and so might have such a privilege. Another objection was, that the allegation of the disturbance ought to have been special, shewing how particularly; *sed non allocatur*. And Sir John Harvey's case, in the the new Book of Entries, fol. 8. was cited as an express precedent. Cro. J. 604. pl. 33. Mich. 18 Jac. B. R. *Dawney v. Dee & al.*

a liberty, that for a disturbance in the first case, as in hindering persons going to the plaintiff's fair or mill, whereby he loses the profits thereof, *vi & armis* lies; but not in the principal case of a liberty of sitting in such a place, that in the first case damage and injury are done the plaintiff, but that here damage only is done the plaintiff, but no injury.* But Haughton J. held, that even in this case if an injury was done to the person, he may have action on the case *vi & armis*; and Mountague and Haughton held, that if one *claim to have a seat*, he may maintain trespass for breaking it; but where he *claims liberty only to sit there* (as the principal case is) there he shall have action on the case, but here action of trespass for the breaking it: and Doderidge J. held, that the plaintiff having joined 2 actions, viz. Trespass for breaking the seat, and case for locking up the door; the count is therefore naught, and so by the opinion of the Court, the plaintiff paid costs to the defendant, and declared *de novo*.—Palm. 46. S. C. Mich. 17 Jac. B. R. according to 2 Roll. Rep.

Nota, that issue was taken upon the reparation of the isle; so that it seems the action would not otherwise lie. [This seems to be a note of the Reporter.] 2 Roll. Rep. 140. at the end of the case of *Dawtrie v. Dee al.*

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Raym. 52.
S. C. And
there Twif-
den said,
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3. Case for disturbing him of a seat *in an isle* of the church, *and prescribed* that he and all tenants of such a house, had all the seats in the said isle. After verdict, it was moved in arrest of judgment, that he had *not shewn that he ought to repair it, &c.* Some would make a difference between a seat in a church and in an isle, because an isle might be upon his own soil; and after several debates it was *adjudged for the plaintiff upon this difference*, viz. That it is *good in an action on the case* against a disturber; *but not in a prohibition, or where he claims a right against the ordinary*; but against a trespassor or tortfeasor, it is not necessary to shew a title, by repairing, &c. Whereupon judgment was given for the plaintiff. Mich. 14 Car. 2. B. R. and affirmed in error in the Exchequer Chamber, Pasch. 16 Car. 2. Lev. 71. *Bunton v. Bateman.*

repairing, this being in an action of the case; but if it had been in a prohibition, there perhaps it had not been good: but when it is as to such house belonging, it is parcel of his franktenement; and then he does not sit there by the licence of the ordinary; Windham and Mallet of the same opinion, but Foster for the defendant. But upon perusal of the record, it was *not tanquam messuagio prædicti pertinent*, but only that he and all those whose estate he has in the said messuage, have used to sit in the said seat, &c. And upon this Windham and the other judges said, that they would advise; and upon that it was adjourned.—Sid. 88. pl. 6. S. C. by name of *Buxton v. Bateman*, and there the seat is mentioned to be *in the choir of the church*; and the Court said, that it does not appear whether it be in the body of the church, or not; for if it be not, it does not belong to the ordinary; and that an isle in a church may be parcel of my house, or in case I am founder, may be allotted to me in lieu of donation, and for sepulture, &c. And it might be that the choir belongs to the plaintiff, and *might have been the place where his ancestors sang requiems for their ancestors, in which cases one may well intitle himself, without alleging any reparation*, and with which the ordinary has nothing to do.—Sid. 201. pl. 25. S. C. Pasch. 16 Car. in the the Exchequer Chamber, and resolved there that the prescription being found by verdict, all things necessary shall be intended to make it good; and therefore they will intend that evidence was then given of the plaintiff's, &c. repairing the said isle; for otherwise he cannot prescribe; and therefore if the defendant had demurred to the declaration, it had been ill for want of alleging reparation, and so they did not wholly allow the difference taken by the justices of B. R. between case and prohibition; but Hale Ch. B. upon the first argument inclined that there was *difference between action upon the case, as above, between 2 strangers, and such action against the patron, to whom of right the soil belongs, or prohibition to the Spiritual Court, to which the decision of such cases (without spiritual title made) of right belongs.*

In case the plaintiff declared that he was *seised of a messuage, and prescribed to have all the seats and*

and sole burial in an isle of the church, and that the defendant disturbed him; after a verdict for the plaintiff, it was moved in arrest of judgment, that plaintiff not having prescribed in repairing the isle, there is no consideration for his propriety; but upon consideration of the case of BURTON v. BATEMAN, it was adjudged for the plaintiff by the whole Court. 3 Lev. 73. Mich. 34 Car. 2. B. R. Ashly v. Freckleton.

If you would prescribe to a right against the ordinary, you must shew a usage to repair the seat; but in an action on the case for disturbance, you need only lay possession against any other disturber; and of common right the disposal of seats in a parochial church belongs to the ordinary. 12 Mod. 233. Mich. 10 W. 3. in case of Jacob v. Dallow.

4. In *trespass for breaking his seat* in the church, the case was, that the plaintiff had an antient messuage in the parish of A. and so *prescribes to have a seat in an isle of the parish church of B. &c.* After a verdict for the plaintiff, it was moved in arrest of judgment, and said by the Court, that though it may be a doubt whether a man may prescribe to have a seat in nave ecclesiae of another parish, yet such a prescription to have a seat in an isle there is good, because it might be that he erected it, and ought to repair it. Sid. 361. pl. 4. Pasch. 20 Car. 2. B. R. Barrow v. Keen.

5. In case for a seat in a parish church by prescription, as ap-
pendant to a house, without alleging any reparations, the de-
fendant pleaded prescription in him and his ancestors, with *traverse*
of the prescription alleged by the plaintiff; but the Court held the
traverse impertinent, and the case rests wholly upon the dis-
turbance; and after verdict judgment was given for the plaintiff,
per tot. Cur. And the difference taken between prohibition and
action, in the case of BURTON v. BAKER, was cited, and agreed
to have been adjudged upon this difference. 2 Jo. 3, 4. Intratur.
Trin. 23 Car. 2. C. B. Bradbury v. Birch.

6. In case plaintiff *declared that he was seised in fee of a messuage, and that he and all those whose estate he had therein, have a seat in the church, and as often as occasion was, had repaired it; and that the defendant disturbed him.* After verdict for the plaintiff, it was moved that the declaration was ill, because the plaintiff did *not prescribe time out of mind.* Per Cur. it is alleged that he was seised in fee, &c. and that he and all those whose estate he had, have had the seat time out of mind, &c. and then by consequence he and all those whose estate he has, have time out of mind, &c. had the seat, especially as *this action is founded upon his possession, and the disturbance made to him.* 2 Lev. 193. Pasch. 29 Car. 2. B. R. Merchant v. Whitepane.

For more of Seats in a Church in general, see Prohibition, and other proper Titles.

Securities.

(A) Security. *In what Cases to be given.*

1. **A** *LEASE* was devised to one for life, with several remainders over to others; the first devisee was compelled to enter into bond to let it go according to the devise; but if it were for a perpetual chattel, the Court would not have done it. Toth. 187. cites 26 Eliz. Price v. Jones.

Where the defendant's testator gave the plaintiff 1000*l.* to be paid at the age of 21

2. *Executors not* compelled in equity to put in bond to perform will, or answer legacies, *unless* it appear that they have either *broken the trust* in them reposed by the testator, *or be decayed since his death*; for at his death it seemed he trusted them without bond. Toth. 150. cites 32 Eliz. Brown v. Purton.

years, the plaintiff by bill suggested the *defendant wasted the estate*, and prayed he might give security to pay this legacy when due; and the Master of the Rolls did accordingly decree the defendant to give security. Chan. Cases, 121. Hill. 20 & 21 Car. 2. in Canc. Duncumban v. Stint.

Where an annuity of 20*l.* was devised out of the personal estate, and the executor had said rashly that he would go to gaol, and leave the legatees unpaid, and the annuity being 3 years in arrear, a bill was brought against him, and prayed that he might give security; and he having by his answer submitted it to the Court, it was ordered that a sufficient part of the personal estate be set apart, and assigned to a trustee for securing the annuity. At the Rolls, Trin. 1723. 2 Wms's Rep. 163. Batten v. Earnley.

[299] 3. *Executors* were ordered to put in good security to allow 5*l.* per cent. for education, and to make good their portions. Toth. 114. cites 44 Eliz. Barwick v. Barwick.

Contra 1 Car. Toth. 115. Rolt v. May.

4. A trustee to put in security for money and damages. Toth. 285. cites Mansell v. Aubery. Pasch. 7 Car. Springet v. Springet. Browne's case, 7 Car.

A trustee was decreed to give security to perform the

trust fairly, there being reasons of suspecting him. Fin. R. 360. Trin. 30 Car. 2. Keeling v. Child.—So of an executor trustee that is insolvent. Carth. 458. The King v. Raynes.

5. *Goods and a library to the defendant, and after to the defendant's daughter and her heirs for ever*; the plaintiff married the daughter, who is since dead; so as the plaintiff, as administrator, seeks to compel the defendant to give security to deliver the goods to the plaintiff after the defendant's death, or the value thereof. This Court decreed the same accordingly, and a commission is awarded to the master to examine upon oath such witnesses as shall be produced before him. 1 Chan. Rep. 110, 111. 12 Car. 1. fol. 388. Bracken v. Bently.

6. A.

6. A. was to pay 300*l.* after his decease to B.——A. sold his estate, B. preferred a bill to have the money secured after A's death. Decreed, that it be retained in the purchaser's hands, and to be paid as aforesaid, and should be protected against A. for the same. N. Ch. R. 43. 17 Car. Martin v. Bocker.

7. A guardian chosen by an infant of 15 years old was decreed to give such security as the master shall allow to be responsible for so much of the rents of the real estate, and the whole of the personal estate which doth belong to her, or which he, or any other by his direction, shall receive during her minority, and until she is in a capacity to receive the same herself. Fin. Rep. 362. Trin. 30 Car. 2. How v. Godfrey.

8. A. covenanted on marriage of his daughter to pay 10,000*l.* within 6 months after his death. The Court will not enforce A. to give security, though urged, that he grew old and infirm, and would probably confound his substance; for this would not be to execute an agreement, but to make a new one; and it differs from the case of *executors*, because they are in nature of *trustees* for the legatee: and there is no agreement between them one way or other. Ch. Prec. 89. Hill. 1698. The E. of Warrington v. Langham.

S. C. cited per Ld. Chancellor. Wins's Rep. 107. Hill. 1708. in the case of Collins v. Plumme.

(B) Relief against them. In respect of the Consideration.

1. **BOND** in common form for payment of money, but proved to be made on agreement, *that the plaintiff should either marry her servant, or by way of forfeiture should pay her the sum mentioned in the condition.* Decreed the bond to be delivered up to be cancelled, it being *contrary to the nature and design of marriage*, which ought to proceed from a free choice and not from any compulsion. Per Lds. Commissioners. 2 Vern. 102. Trin. 1689. Key v. Bradshaw.

2. A woman resorts to gaming places at court, and borrows money to supply persons of quality in their gaming, and gives the lenders great premiums; and afterwards borrows more, and is arrested for the last money lent, and gives bond and judgment for it, and brings a bill to have allowance for the former excessive premiums which she allowed, the receipts for which she produced. It was urged, that the bonds so obtained were within the provision of the statute of usury; but by the warrant of attorney and entering up judgment, the defendants had lost the opportunity of defending themselves at law. But the Lords Commissioners would give no relief but on payment of principal, interest, and costs at law and here. 2 Vern. R. 170. pl. 156. Trin. 1690. Taylor v. Bell and Bagnal & al'.

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3. A. got judgment in a trustee's name on a bond given for a play-debt. The Court (though the plaintiff had slipped his opportunity at law) directed an issue and relieved the plaintiff.

2 Vern. Rep. 172. Trin. 1690. cited as the case of Powell v. Hall in the Exchequer.

(C) Relief against them. *Though given on a seemingly good Consideration.*

1. **A** TENANT for life, in right of his wife makes a *lease of a rectory for 21 years, at 100l. per ann. payable at Lady-Day and Michaelmas.* The wife *died a fortnight before Michaelmas.* The tenant and A. came to an agreement, that if A. would save him harmless against all others for the rent, he would give *bond to A. for 80l. and accordingly gave bond; but afterwards sues to be relieved against this bond: no rent was due, and so the bond without consideration, and had a decree against the bond; though it was urged, that there was no fraud, and the tenant had taken all the summer profits, and therefore should pay for them at least in proportion.* Chan. Cases, 239. Mich. 26 Car. 2. *Negus v. Fettiplace.*

2 Ch. Cases,
103. Pasch.
84 Car. 2.
White v.
Small.

2. A. being of weak understanding was prevailed upon by relations and friends, in order to preserve the estate in the family, to give *bond of 6000l. penalty to settle his estate by intailing it to himself first, and after to his brothers, so as not to go out of the family.* A. after married, and settled the estate on his marriage. On a bill by him to have the bond delivered up, it had been so decreed, but that he offered by the bill to settle part in tail on his brother. 2 Vern. 189. Mich. 1690. *Portington v. Eglington.*

3. A. a very poor illiterate man, being intitled to a good estate; applied to B. & M. his wife, to assist him in making out his pedigree and title. B. (who was a brasier) told him, that such things could not be done without money; whereupon A. desired B. to advance it, and he would repay him: accordingly B. advanced the money. Pending the suit M. often declared, she thought herself and husband intitled to a good gratuity for their trouble, but was resolved not to trust the plaintiff's generosity, but to bind him as fast as pen and ink could bind him. Afterwards A. desired M. that she and B. would continue to take care of his affairs, whereupon M. pressed him much to pay what had been already laid out. A. offered a bond of 1000l. payable in a year, for services done and to be done. M. replied, that he might take what time he pleased to pay the bond, but pressed hard for the money laid out. A. gave his bond to M. for 1000l. for the use of B. who, after recovery of some part of the estate by A. put the bond in suit: whereupon A. brought his bill to set it aside as unduly and unconscionably obtained, by taking advantage of the distress he was under at the time. Ld. Ch. Talbot said, he could not consider this as a gratuity, but a contract; and held, that though B. was not present at the executing the bond, yet he thought there was ground sufficient for relief; for M. was party to all the transactions in searching registers, &c. That the contract for the bond was for their

their joint service, and though she did not press for the bond, yet she *pressed for what worked more strongly, viz. The payment of the money laid out, and this when A. was not worth 1s. and in the midst of the pursuit of the cause; which, together with her saying, she would not trust his generosity, &c. shews the *bond was got of A. in his necessity*, the pressing the payment being almost as strong as if she had actually insisted upon the bond; and so decreed it to stand as a security for so much as had been actually laid out, with interest, and left B. at liberty to bring his quantum meruit at law, for what he deserved for his pains and trouble. Cases in Equ. in Ld. Talbot's time, 111. Trin. 1735. Proof v. Hines.

(D) Relief against them. The *Consideration not being performed.*

See Agreement, Fraud, Purchaser.

1. **T**HE plaintiff sought to be relieved upon an *obligation* of 300l. which he entered into *to make a jointure* unto his wife, *in consideration of* 174l. promised to him by the defendant in marriage, which was never paid unto him; therefore an *injunction* is awarded, if cause be not shewed. Cary's Rep. 159, 160 cites 21 Eliz. Osborn v. Havers.

(E) Relief against them *pro turpi causa.*

See (F) pl. 2.

1. **B**. GAVE bond of 500l. to the brother of the defendant, conditioned *to pay the defendant's sister* (party also to the bill) 50l. *and to maintain a base child, paying a certain yearly sum for it.* There was no place in the condition where the 50l. should have been paid. The plaintiff by his bill offers payment of the 50l. and brought it into court; and the defendant set forth by answer, that the plaintiff was suiter to her in way of marriage, but abused her and left her: and thereupon the Court refused to grant an injunction to the plaintiff against the suit on the bond. The plaintiff replied, and acknowledged he was a suiter, and really intended marriage, but that after he had begun to woo the woman, he was informed, as the truth was, that she had formerly been taken in bed with another man; and that this was known publicly, and her father trapped him to woo her, &c. he being a young man in Oxford; yet now the Lord Chancellor denied the injunction, saying, this Court should not be a court to examine such matters. 2 Chan. Cases, 15. Hill 31 & 32 Car. 2. Bodly v. ———.

2. A bill was brought by W. to be relieved against a *bond and judgment defeasanced* for payment of 400l. to N. the defendant; and charged, that though *the security recited* 400l. *as lent and paid by N.* to the plaintiff, yet no money was really paid. N. by answer, confessed, that the 400l. was neither paid or intended to be

The case of BOURMAN v. UPHILL, was cited in the case of WHALEY v. NORTON, as a case in

point with this very case through-out; and the Court would not relieve in that case.

—S. C. of Uphill v. Bourman, cited 2 Vern. 242. in the case of Bainham v. Manning, and says, the bill there was

be paid by her, *the inserting which was a mistake of the scrivener; for that the 400l. was intended as a free gift.* The truth of the case was, that N. was for some time kept by the plaintiff as a mistress, and the 400l. was given her on that account, but nothing of this was mentioned in the bill. The Master of the Rolls took a difference between things executed and executory, that this court would relieve as to the last, which if executed, it may be might stand; but he * saw no ground for relief here, where it seemed to be a voluntary gift without any turpis contractus. But had it been charged in the bill, that the defendant was a *common strumpet*, and had made it a practice to draw in young gentlemen, he thought it reasonable to relieve; but though this might be the fact, it *must be so charged* in the bill, or *else the Court will not let depositions to that purpose be read.* Vern. 483. pl. 472. Mich. 1687. Whaley v. Norton & al'.

dismissed. — A bill was brought by executor to be relieved against bonds given by testator to H. M. a single woman, and others in trust for her, and suggested, that they were gained by threats and undue means. The defendant by answer says, they were entered into for money lent, and debts due. Upon the proofs it appeared, that the defendant was a *common barlot*, and the plaintiff's father was an *old weak man*, and had unlawful conversation with her, and was prevailed upon to enter into the bonds in question. Per Cur. though where the party himself, that is culpable, comes for relief against the said bonds, the Court may justly refuse to interpose, yet it is otherwise where his executor comes. And here the defendant swears, that the bonds were entered into for money lent, or other debts owing to her, which sufficiently puts the matter in issue; and though the trustees had declared a special trust for a particular purpose, as to one of the debts, yet that will not avail; it not appearing, that the testator was privy thereto; and therefore decreed an account of what should be due for monies lent, and other real debts, and on payment the bonds to be delivered up. 2 Vern. 187. pl. 170. Mich. 1690. Matthew v. Hanbury & Ux' & al'. — 2 Vern. 242. pl. 226. Mich. 1691. in the case of Bainham v. Manning, it is said, that in the case of Hanbury v. Matthew, the bond was relieved against, because the woman appeared to have been a common strumpet, and by her insinuations prevailed upon the old man.

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And tho' a bond given to a housekeeper for payment of

3. Bond was given to a housekeeper for secret service; and a bill being brought to be relieved against it, was dismissed. 2 Vern. 242. Mich. 1691. Bainham v. Manning.

an annuity be lost, yet equity will decree the payment; for service is a consideration, and *turpis contractus* shall not be presumed unless proved. Abr. Equ. Cases, 24. pl. 7. Hill. 1700. Lightbone v. Weedon.

4. A. had seduced his wife's sister, and had several children by her, and had given her some bonds for payment of money, and which were intended as a provision for her and the children. Ld. Somers decreed payment of principal and interest and good costs by a short day, or else the bill to be dismissed with costs. Ch. Prec. 114. Trin. 1700. Spicer v. Hayward.

5. A. had unlawful familiarities with E. who before was a modest woman, but seduced by him, and had a child by him. A. gave a bond to pay 2000l. to E. within a year after his death. Afterwards A. by deed poll reciting the bond agreed that the 2000l. should be laid out in an annuity for E. and the child for their lives. A. died. E. sued A's administrator on the bond. The administrator prayed relief against the bond as gained upon a wicked consideration; and E. (having been nonsuited at law by the only witness to the bond denying that he saw the bond sealed and delivered,

Ibid. 434. says this decree was affirmed in the House of Lords in March 1728. — Abr. Equ. Cases, 87. pl. 6. S. C.

livered, though his hand-writing was proved) brought her cross-bill to be paid out of A's assets. The deed-poll was proved and read; Ld. C. King, in regard of the seducing an innocent woman, and likewise in respect of the innocent child, which was living at the time of the bond and covenant, though since dead, decreed the payment out of the assets, the case being to be taken as it was when the bond and covenant were given. 2 Wms's Rep. 432. Hill. 1727. Annandale (Marchioness) v. Harris.

6. *A. kept K. R. a mistress, and cohabited with her upwards of 2 years, in which time he had a child by her, and being about to marry another person he voluntarily entered into a bond of 2000l. for payment of an annuity of 80l. a year for her and her child's maintenance. A. married, and died, leaving issue by his wife, who brought a bill to set aside this bond. The Master of the Rolls decreed the annuity to be paid, but after all creditors even by simple contract, but gave no directions whether the real estate should be chargeable with this annuity in case of a defect of personal assets. Upon appeal to the Ld. Chancellor, he held, that though it is a voluntary bond, yet there being no pretences of fraud, there is no reason to relieve against it, but that it shall be postponed to debts upon simple contract, though preferred to legacies. And decreed, that if the personal estate fall short upon payment of the arrears, and growing payments by the plaintiff, the heir at law, and upon his securing the annuity out of a sufficient part when he comes of age, the defendant K. R. be restrained from proceeding upon this bond at law. Cases in Equ. in Ld. Talbot's time, 153. Mich. 1735. Cray v. Rooke.*

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(F) Transferred, or a *defective* Security made good by substituting another in its room.

1. **A** HAVING issue a daughter and being seised of lands in D. and S. charges his lands in D. for payment of 3000l. portion to her, and after marries B. and settles part of the lands in D. on his wife for her jointure, without taking any notice of the 3000l. settled on the daughter. Afterwards A. thinking the portion would take place of the jointure, and expressing his thoughts in his will, devises to his wife his land in S. in lieu of the lands in D. and dies. The wife combines with the heir to jostle out the daughter, and so refuses the devise, and sticks to her jointure. On a bill by the daughter, Ld. North decreed, that the daughter should hold such part of the lands in S. as should be equal in value to such of the lands in D. as were comprised in the jointure, till her 3000l. be raised. Vern. 219. pl. 217. Hill. 1683. Reeve v. Reeve.

Vent. 363. Sir Robert Reeve's case, S.C. accordingly.

2. A man having debauched a young woman, and intending afterwards to put a trick upon her, settled an annuity upon her of 30l. per annum for life, out of an estate which he had nothing to do with; yet the Court of Exchequer decreed him to make it good

So where the estate was incumbered, and the young gentlewo-

out

man dying, out of an estate which he had of his own; and this decree was
 her admi- afterwards affirmed on appeal to the House of Lords. Cited in
 nistrator the case of the Marchioness of Annandale v. Harris. Trin. 1727.
 brought a and said to have been adjudged about a year before. Abr. Equ.
 bill to dis- Cases, 31. pl. 4.—87. S. C. cited in S. C.
 incumber the land

which was charged with the annuity, it being granted for a term of years, and was relieved accord-
 ingly. Cited 2 Wms's Rep. 433. Arg. in the case of the Marchioness of Annandale v. Harris.
 Hill. 1727. as the case of Ord v. Blacket.——2 Wms's Rep. 434. cites S. P. as decreed in the
 Exchequer about two years before between Carew and Stafford.

For more of Securities in general, see Agreement, Fraud,
 Mortgages, Trust, Usury, and other proper Titles.

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(A) Se Defendendo.

*At the com- 1. BY the statute of Gloucester, 6 E. 1. cap. 9. in case it be *
 mon law, found by the county that the person indicted for the death of
 before this a man did in his defence, or by misfortune, then by the report of
 statute the the justices + to the king, the king shall take him to his grace, || if it
 killing of a man se de- please him.
 fendendo*

was punishable by death. 2 Inst. 315.

* This may be 2 ways, either when he is indicted of murder or homicide, and the jury find it se
 defendendo, or when he is specially indicted, that he killed a man se defendendo, whereunto (for
 safeguard of his goods) he may plead not guilty; and if he be found guilty se defendendo he forfeits
 his goods, if not guilty, he saves them. 2 Inst. 316.

If a man be indicted before the coroner of the death of a man se defendendo, and that he fled for
 the same, he shall forfeit his goods, which savours of the common law. 2 Inst. 316.

No man can be accessory to one that kills another se defendendo. 2 Inst. 316.

If a man be indicted for killing of a man by misadventure, or se defendendo, and is outlawed
 thereupon, he shall forfeit no lands, but goods and chattels only. 2 Inst. 316.

+ That is in the Court of Chancery, the pleas whereof be coram domino rege in cancellaria; and
 there the Lord Chancellor, upon the record certified him in the Chancery by force of a writ of
 certiorari, shall of course, by force of this act, grant him his pardon without speaking hereof to the
 king, for that speaking is intended judicially in court; and note this clause is general, and extends
 well to an appeal, as to an indictment; and therefore if a man be appealed of murder, and it is
 found that he did it se defendendo, or by misadventure, the king is to pardon it; for the offender
 cannot be put to death, which is the end of his suit, and an appeal lies not for such a killing; other-
 wise it is where the appellee is to have judgment of death, for there the king cannot pardon it.
 2 Inst. 316.

|| Those are but words of reverence to the king, for the king is obliged ex merito justiciæ to grant
 the pardon, albeit some opinion is to the contrary; otherwise the Lord Chancellor could not do
 it without warrant from the king. 2 Inst. 317.

Serjeant 2. A. pursued W. with a weapon, and struck him, and the other
 Hawkins struck him again, by which he died, and he who killed him might
 says, he can have fled from him who assaulted him if he would; and because he
 see no reason why a per- did

did not do it but killed the other, therefore it was adjudged felony of death; and the justices said he is bound to fly as fast as he can to save his life; quod nota. Br. Corone, pl. 124. cites 43 Aff. 31. son, who without provocation is assaulted by another in any place

whatsoever, in such a manner as plainly shews an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, &c. may not justify killing such an assailant as much as if he had attempted to rob him; for is not he, who attempts to murder me, more injurious than he who barely attempts to rob me? And can it be more justifiable to fight for my goods than for my life? And it is not only highly agreeable to reason, that a man in such circumstances may lawfully kill another, but it seems also to be confirmed by the general tenor of our law-books, which speaking of homicide se defendendo, suppose it done in some quarrel or affray; from whence it seems reasonable to conclude, that where the law judges a man guilty of homicide se defendendo, there must be some precedent quarrel in which both parties always are, or at least may justly be supposed to have been in some fault, so that the necessity to which a man is at length reduced to kill another is in some measure presumed to have been owing to himself; for it cannot be imagined, that the law, which is founded on the highest reason, will adjudge a man to forfeit all his goods, and put him to the necessity of purchasing his pardon without some appearance of a fault. And though it may be said, that there is none in chance-medley, and yet that the party's goods are also forfeited by that, he answers, that chance-medley may be intended to proceed from some negligence, or at least want of sufficient caution in the party, who is so unfortunate as to commit it, so that he does not seem to be altogether faultless. Besides, one of the reasons given in our law-books for which homicide se defendendo forfeits goods, is because thereby a true man is killed; but it seems absurd, that he who apparently attempts to murder another, which is the most heinous of all felonies, should be esteemed such, when those who attempt other felonies, which seem to be much less criminal, are allowed to be killed as downright villains, not deserving the protection or regard of the law Hawk. Pl. C. 72. cap. 28. S. 24.

However, perhaps in all these cases, there ought to be a distinction between an assault in the highway and an assault in a town, for in the first case it is said, that the person assaulted may justify killing the other without giving back at all; but that in the second case, he ought to retreat as far as he can without apparently hazarding his life, in respect of the probability of getting assistance. Hawk. Pl. C. 73. cap. 28. S. 25.

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3. A man was indicted that he killed a man se defendendo, and the Chancellor said that he had granted to him charter of grace, and the serjeants said that he need not; for the justices will not arraign him where it appears in the indictment that it was se defendendo; but if the indictment be of felony without these words se defendendo, yet he shall be arraigned, and if it be found se defendendo upon the arraignment, he shall be kept till he has pardon; but by the justices of the bank where se defendendo appears in the indictment, yet the inquest shall be taken to say if it was se defendendo or not, and if it be found se defendendo, he shall lose his goods, but he shall have pardon the one way and the other. Br. Corone, pl. 138. cites 4 H. 7. 1. 2. J. A. was indicted of the death of a man se defendendo, and Frowicke, before whom the trial was to be, was clearly of opinion to have discharged him, and it seemed to him that

the statute of Gloucester [6 E. 1. cap. 9] did not extend to this case, but where he is first indicted that he did the murder felonice, and the special matter is found by verdict, there the king shall take him to his grace; but he was of opinion, that where the special matter is found by the indictment he shall never be charged to answer to the indictment, nor shall he forfeit any goods. But afterwards in Mich. term following he put the question to the judges at Westminster. And the opinion of all the judges of England was, that he shall be arraigned in this case, and shall be put to sue for his charter of pardon. Whereupon Frowick caused the indictment to be sent in B. R. and there J. A. pleaded his charter, and was bailed in the mean time. Keilw. 53. pl. 8. Trin. 19 H. 7. John Aprice's case.

In case of se defendendo the party forfeits his goods, and he stands in need of a pardon, though it be of course. Per Scroggs Ch. J. 2 Show. 78. pl. 61. Trin. 31 Car. 2. B. R. in the case of Confield v. Linton.

4. A man was arraigned upon indictment of murder, and pleaded not guilty; and it was found that the deceased assaulted him, S.P. 2 Inst. 316. And says it is a maxim of

the common law, that the life of a man is of so precious regard in law, that the death of a man can not be justified, though it be se defendendo, but he must plead not guilty, and the jury may find the truth of the fact. 2 Inst. 316.

And herein note a *diversity* between an *appeal of death*, and an *appeal of mayhem*; for in appeal of mayhem, if the defendant plead not guilty, he cannot give in evidence that it was se defendendo, for that he ought to have pleaded it by way of justification in bar of the action. 2 Inst. 316.

There is also another *diversity* between an *appeal of mayhem*, or an action of *trespass for wounding*, or menace of life and member: and an action of trespass of *assault and battery* for a man in defence, or for the preservation of his possession of lands or goods; for in that case he may justify an assault and battery; but he cannot justify either maiming or wounding, or menace of life and member; and so note a diversity between the defence of his person, and the defence of his possession or goods. 2 Inst. 316.

* S. P. Per Scrooggs Ch. J. 2 Show. 78. in the case of Bonfield v. Linton.

5. An indictment, or a verdict that A. killed B. se defendendo is not good, but the * *special matter must be set down* to the end the Court may adjudge it to be upon inevitable necessity. 2 Inst. 315.

[306] 6. Homicide se defendendo seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who *attempts to beat him* (especially if such attempt be made upon him in his own house) kills the person by whom he is reduced to such an *inevitable necessity*: and not only he, who on an assault *retreats to a wall*, or some such streight, beyond which he can go no farther, before he kills the other, is adjudged by the law to act upon unavoidable necessity, but also he, who being assaulted in such a manner, and in such a place, *that he cannot go back without manifestly endangering his life*, kills the other without retreating at all. And notwithstanding, a person who retreats from an assault to the wall, *gives the other wounds in his retreat*, yet if he give him no mortal one till he get thither, and then kills him he is guilty of homicide se defendendo only. And an officer who kills one that resists him in the execution of his office, and even a private person, that kills one who feloniously assaults him in the highway, may justify the fact without giving back at all. According to some good opinions, even he who gives another the first blow on a sudden quarrel, if he afterwards does what he can do to avoid killing him, is not guilty of felony; yet such a person seems to be too much favoured by this opinion, inasmuch as the necessity to which he is at last reduced, was at the first so much owing to his own fault; and it is now agreed, that if a man strikes another upon malice prepense, and then flies to the wall, and there kills him in his own defence, he is guilty of murder. Hawk. Pl. C. 74, 75. cap. 29. S. 13. &c.

For more of Seisin in general, see Murder, Necessity, and other proper Titles.

Seisin.

Seisin.

(A) Affise. Seisin. Rent. What shall be good
Seisin to have Affise.

Fol. 463.

[1. IF a man *purchases* a rent, and the *tenant attorns*, yet this shall not make any seisin to have an affise. 49 Aff. 6.]

The purchaser ought to be

seised of the rent itself to have an affise. Br. Affise, pl. 461. cites 3 E. 3. and Fitzh. Aff. 444.—
S. P. Br. Seisin, pl. 4p. cites 3 E. 3. Itin. North. Per Scroope.

[2. If a rent *descends* to a man and the *tenant attorns* to him, yet this shall not make any seisin to have an affise. 49 Aff. 6. 49 E. 3. 15. b.]

[3. If the *tenant attorns to the grantee of a rent by a penny*, this shall not make a seisin to have affise. Litt. 127. b. Contra 22 Aff. 66.]

If the tenant when he attorns to the grantee, or

afterwards, will *give a penny or a halfpenny* to the grantee *in name of seisin of rent*, then if after at the next day of payment the rent be denied him he shall have an affise of novel disseisin. Litt. S. 236.

So it is if a man *grants* by his deed a *yearly rent*, issuing out of his land to another, &c. if the grantor then or after pay to the grantee a penny or a halfpenny, in the name of seisin of the rent, then if after the next day of payment the rent be denied, the grantee may have an affise, or else not, &c. Litt. S. 236.

[4. If the *tenant attorns to the lord*, and gives him a penny as *parcel of the rent*, this shall make an actual seisin whereupon to have affise. Litt. 127. b.]

If I hold by fealty, 20s. rent and a hawk of you, and

you grant over my services, and I pay a penny *in name of attornment*, this does not give possession to bring affise, but causes the services to pass. Per Frowicke Ch. J. Kelw. 73. b. pl. 18 Mich. 21 H. 7.

* And if the penny be paid *in name of seisin of the rent of 20s. and not of the hawk*, this gives seisin of the rent only and not of the hawk; but if in name of seisin of all the services, then it serves for all of what nature soever. Per Frowicke, Ch. J. Kelw. 73. b.

A seisin of *parcel* is a sufficient seisin in law to have an affise of the whole. Co. Litt. 153.

[5. So if he gives to him an *halfpenny or farthing*, by way of seisin of the rent, this shall make good seisin to have affise. Litt. 127. b.]

[307]* And yet it is no part of the rent, nor shall be abated out

of it, it being given before the day whereon the rent is due. Co. Litt. 159. b. 313. s. — It is to be observed, that *payment of any money in the name of seisin of the rent, before any rent becomes due*, is a good seisin of the rent to have an affise when it is due, and that which is given in the name of seisin of the rent worketh his effect to give seisin, and yet is no part of the rent, nor shall be abated out of the rent. Co. Litt. 161. b.

[6. [So]

S. P. Co. [6. [So] if the tenant attorns to the lord, and pays to him *an ox or cow* in the name of seisin of rent, this is sufficient seisin to have assise of the rent. 49 E. 3. 15. b. 49 Aff. 6. Curia.]
 Litt. 315. a. and says that so it is of a horse, a sheep, or a knife, or other valuable thing.——But upon grant, if the tenant attorns of the rent by an ox or a branch, this is no seisin to have assise. Br. Seisin, pl. 7. cites 49 E. 3. 14.

Br. Assise, [7. So if a man recovers a rent-service, and the sheriff puts him in seisin by an ox, in lieu of execution; this is good seisin to have assise. 49 Aff. 6. 49 E. 3. 15. b. By Persey.]
 pl. 461. cites 3 E. 3. and Fitzh. Ass. 444.——

Where a man recovers rent or common, and is put in possession by the sheriff, and is at another time disturbed, he shall have assise or redisseisin upon the first seisin delivered by the sheriff; for the law adjudges him in possession; per Thorp, quod non negatur; therefore quære. Br. Seisin, pl. 5. cites 45 E. 3. 25.

Upon recovery of rent, seisin by distress, or the like, in lieu of the rent, suffices to have assise of the rent. Br. Seisin, pl. 40. cites 3 E. 3. Itin. North. Per Scroope.

If one recovers, and is put in by [8. So it is, if he puts him in seisin by a branch or turf of the land. 49 Aff. 6. 49 E. 3. 15. b. By Persey.]

a clod in a moiety by the sheriff, and be against whom the recovery was, will not go out, yet that is a sufficient seisin to have an assise. Kuch. of Court Lects, 124. Tit. Seisin of Assise, cites 2 Ed. 2. Tit. Execution, 19.

If a feme recovers dower of rent, the sheriff may put her in seisin by grass or glebe, or by beasts of the tenant; but it is not lawful for the demandant to chase those beasts, but to take seisin by them; per Finch. And so see that this is a good seisin upon a recovery. Br. Seisin, pl. 3. cites 40 E. 3. 22.——But it is said elsewhere, that contra it is of a grant of rent; for there seisin shall be by a thing of the same nature. Br. Seisin, pl. 3.

Seisin to maintain an assise for rent, ought not to be of a contrary nature to the thing of which seisin is intended to be given, but in one case only, and that is where the sheriff gives seisin of the rent by a twig or a clod of earth, and this is in case of necessity; for the sheriff cannot take the money out of the tenant's purse, and deliver seisin of that. 2 Brownl. 237. Per Williams J. in case of Earl of Rutland v. Shrewsbury.——S. P. Br. Seisin, pl. 3.

* Br. Seisin, [9. If a man grants to another 4 several rents, and the tenant of the land attorns to the grantee, by a penny or halfpenny, in name of seisin; this shall make an actual seisin to have assise for all the rents. * 22 Aff. 66. Per Thorp. But there it is, that he gives it in name of attornment, which cannot make an actual seisin; but if it be good seisin, it is seisin for all, which admits this case. Co. 4. Bevil, 9.]
 pl. 27. cites S. C. Per Thorpe, quod non negatur.——Actual seisin is requisite to have an assise. 4 Rep. 9. in Bevil's case.——Co. Litt. S. 235. 160.

S. P. And [10. If a man recovers a rent, and the sheriff, upon a writ of execution, puts him in seisin by parol upon the land; this is good seisin to have an assise. 22 Aff. 84. Per Thorpe.]
 so of common, or the like; Brook says, quod quære bene. Br. Seisin, pl. 36. cites S. C.

[308] [11. If a man distrains for a rent-seck, this does not make any seisin of the rent to have an assise. 26 Aff. 36. adjudged.]
 But if once he has seisin, and afterwards the rent not being tendered to him, he comes to the land after the day of payment past, and there demands the rent, though it be in the absence of the tenant of the land, yet if none be ready there to pay, it is a denier in law whereupon to have assise, inasmuch as no penalty will follow upon it, but only to have remedy to recover his rent, with damages and costs. Resolved. 7 Rep. 28. b. 29. a. Hill. 43 Eliz. C. B. Maund's case.

If a man recovers rent in assise, and after distrains, and rescous is made, he shall have redisseisin without other title; per Knivet. Quere; for it seems that this is no seisin, so that he may be redisseised. Br. Seisin, pl. 28. cites 40 Aff. 23.

12. A man entered into the land of R. S. and infeoffed his own daughter, and delivered seisin to her, and R. S. came upon the delivery, and because he could not enter by the door he entered by the window, and when part of his body was in the house, and the other out, he was drawn back, and brought assise, and recovered. And so see good entry and good seisin. Br. Seisin, pl. 20. cites 8 Aff. 25. Kitch. of Court Leets, 123. Tit. Seisin of Assise, cites S. C.

13. A feme leased for life rendering rent, and granted the reversion and rent to M. in fee, the tenant attorned and died, and A. entered and infeoffed T. who disturbed M. that she could not enter by reason of the debate which he made, so that M. could not take any rent of any of the farmers; and M. brought assise against T. and recovered, quod mirum! for it is no seisin unless M. durst not enter. Br. Seisin, pl. 22. cites 14 Aff. 12.

14. If a man seised of rent grants it upon condition, and the condition is afterwards broke, and the grantor distrains, and rescous is made, he shall have assise by the seisin had before the grant. Br. Seisin, pl. 38. cites 15 E. 3. and Fitzh. Assise. But if lord and tenant by fealty and rent be, and the lord is in

seisin of his rent, and grants his seignior to another, and to his heirs upon condition, the tenant attorns, and pays his rent to the grantee, the condition is broken, the lord distrains for his rent, and rescous is made; he shall be in of his former estate, and yet the former seisin shall not enable him to have an assise without a new seisin. Co. Litt. 202. b.

15. In assise it was adjudged, that if a man who has title of entry comes, and put his foot in, and is ousted; this is good seisin to recover by assise. Br. Seisin, pl. 52. cites 22 E. 3. 15. Kitch. of Courts Leets, 122. Tit. Seisin of Assise, cites S. C.

16. If rent is issuing out of a parsonage, and the parson goes beyond sea, and his procurator pays the rent; this is good seisin to have assise. Br. Seisin, pl. 47. cites 33 E. 3. and Fitzh. Verdict, 47. So if * bailiff makes such payment of rent due.

Br. Seisin, pl. 47. cites 33 E. 3. and Fitzh. Verdict, 47. — Contra if they pay rent which is not issuing out of the parsonage or manor. Br. Seisin, pl. 47. cites 33 E. 3. and Fitzh. Verdict, 47.

* Payment by bailiff is sufficient seisin, unless it work a special prejudice to his lord; but in such case the bailiff must have his master's command. 6 Rep. 59. a. in Brediman's case.

17. Land descended to two parceners by 2 venters, the one dies before entry, the other shall have mortdancestor as heir of his father of the whole, inasmuch as the other was never seised. Br. Seisin, pl. 42. cites 34 Aff. 10.

18. If one puts in his beasts to use my common by commandment; this is a sufficient seisin for me to have an assise. Kitch. of Court Leets, 122. Tit. Seisin of Assise, cites 45 E. 3. fol. 25. 22 Aff. 84.

19. In assise it was held by Parle, that if rent issues out of certain land which is inclosed in a park of ancient time, so that none can come to distrain, because the gate is always locked, that of this inclosure assise does not lie, because it is not inclosed for this purpose, and also is made of ancient time, so that the maker is

dead; therefore quære where a man at this day keeps such land anciently inclosed, and the rent is demanded, if he shall not be a disseisor as well by the keeping it inclosed, as if he himself had inclosed it. Br. Seisin, pl. 6. cites 49 E. 3. 15.

[309] 20. He who is an officer, as a clerk of the crown in chancery by grant of the king, and writes a writ, and takes the fee, it is sufficient seisin; quod nota. Br. Affise, pl. 95. cites 9 E. 4. 6. Per Tot. Cur.

21. In replevin it was held by all the justices, that *seisin of more service than the tenant ought to pay* shall not bind the tenant in affise of rent, cessavit, or in writ of rescous; for there the tenure shall be tried, and not the seisin. Contra it seems in avowry; for there the seisin shall be answered. Br. Seisin, pl. 31. cites 12 E. 4. 7.

S. P. Br. Seisin, pl. 30. cites 5 E. 4. 2.—So of 12d. for the 3 first years

22. A. makes a gift in tail to B. rendering the first year a rose, and the second year a rent: the possession of the rose the first year is good possession of the rent when it shall be due in the second year, because the seignior is a thing intire. Arg. Kelw 163. M. 3 H. 8.

and 5l. after. Per Altham J. Lane 115 cites 22 Aff. 52. — S. P. 4 Rep. 49. b. in Ognell's case cites 22 Aff. 52. pl. 34.—So of a lease for life, or gift in tail, rendering the first year a quarter of corn and after 5l. per ann. Seisin of the corn is seisin of the rent, whereof he may have affise; for all is not but one reservation. 4 Rep. 9. in Bevill's case.

23. *Attornment, i. e. agreement to the grant*, is no seisin of the rent. Co. Litt. 159. b.

24. The grant and delivery of the deed is no seisin of the rent; and a *seisin in law*, which the grantee has by the grant, is not sufficient to maintain an affise, or any other real action: but there must be an actual seisin. Co. Litt. 160.

25. If rent-service afterwards becomes rent-seck, seisin of the rent-service will serve for the rent which is now rent-seck. Jo. 237. Falkner v. Bellingham.

(B) What shall be good Seisin. In what Cases Seisin of Part shall be Seisin of all [to have Affise.]

S. P. Br. Seisin, pl. 59. cites 3 E. 5. & Fitzh. affise.

[1. SEISIN of part of the rent is good seisin of all to have an affise. 29 Aff. 59. adjudged. * 12 E. 4. 7. b. by all the justices. Co. 4. Bevil. 9.]

—S. P. Br. Seisin, pl. 17. cites 8 Aff. 4.—S. P. Kitch. of Court Lects, 123. tit. Seisin of Affise, cites 8 Aff. 4.—Br. Affise, pl. 425. S. P. cites 8 E. 3. 12. & Fitzh. Aff. 141.—A lease is made for life, reserving 4 marks rent, and the lessor is seised of 20s. thereof and takes distresses for the remainder, and rescous is made; and though but 20s. be received, yet that is a sufficient seisin to have affise of all. Kitch. of Court Lects 123. tit. seisin of affise, cites 8 Edw. 3. fol. 12. tit. 141. 8 Aff. 4. 5 E. 4. 2. 12 E. 4. 7.

If a man grants his seignior to J. S. and the tenant attorns before any day of payment by 1d. in name of All Rents and Services, it was said, that by this seisin he shall have affise; but Heydon contra, and that the seisin of 1d. is not seisin of all the rent; but Brooke says quære inde. For upon recovery of rent, if the plaintiff be put in seisin by a clod or twig, and rescous is made, he shall have affise without other seisin. Br. Seisin, pl. 30. cites 5 E. 4. 2.

Seisin of part is seisin of all the rent of one and the same nature. Per Kingsmill. J. Kelw. 73.—Per Frowicke Kelw. 73. b.—But not unless it be paid in the name of seisin of all. If I have ancient deed of 20s. rent, and I have been out of possession of 10s. part of the 20s. time out of mind,

and of the other 10s. I have been always in possession. In this case I may avow for 10s. and for the other 10s. I am put to my writ of customs and services; Per Frowicke Ch. J. cites it as adjudged. Kelw. 73. a. b.

* Br. Seisin, pl. 31. cites S. C.

2. If a man holds by fealty and rent, a seisin of fealty is not sufficient seisin of the rent to have an assise. 49 Ass. 6. 49 E. 3. 15. b. Per Hasty.

S. P. Br. Assise, pl. 454. cites 8 E. 1. & Fitzh. Assise

432. But Brooke says it seems contrary for avowry. — Seisin of fealty is not sufficient seisin to have an assise of rent, but it is a sufficient seisin to make avowry for all, that is, as well for the rent as for the fealty. Kitch. of Court Leets. 123. tit. Seisin of Assise. cites 44 E. 3. fol. 11. by Thorp. 3 Ed. 3. tit. 40. 3 Ed 3. Itin. Nortolk. 20 H. 3. tit. 433. 49 E. 3. 15. & 45 Ed. 3. 28.

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3. Seisin of fealty is not sufficient seisin to have an assise of rent; but seisin of escuage is seisin of homage. Kitch. of Court Leets. 123. tit. Seisin of Ass. cites 21 Edw. 3. fol. 52. Nat. Brev. fol. 109. 5 Edw. 2. Avowry. 209.

4. In assise it was found, that A. died seised of one acre in D. and of another acre there jointly seised with his feme who survived, and the heir enters into the acre, of which the father died sole seised, in name of all the tenements in D. of which his father died seised; and per judicium this does not give him seisin in the acre of the mother, because he did not enter into it, and the entry into the other acre in form as above shall serve only for those parcels into which he had right of entry; quod nota. Br. Seisin. pl. 27. cites 39 Ass. 16.

5. Seisin of parcel of any service is actual seisin of the whole service to have assise. 4 Rep. 9. a. in Bevil's case.

(C) In what Cases Seisin of one shall be Seisin of another to have Assise.

Fol. 464.

[1. IF a prior be seised of a rent and dies, and the successor distrains, and rescous is made, he may have an assise; for the seisin of the predecessor is good seisin for him. 49 Ass. 5. * 49 E. 3. 14 b. Adjudged. Dubitatur 29 Ass. 59.]

Br. Seisin, pl. 7. cites S. C. — A prior and his predecessor had been

seised of a rent seck of time, &c. and the prior distrained where he ought not to distrain, and rescous was made, and he died, and his successor demanded the rent, which was denied, and he brought assise, and took nothing by his writ, because the predecessor was not seised; but if the predecessor had been seised, and the disseisin had been in time of the successor, he should have had assise though he was never seised, and this upon the seisin of his last predecessor. Br. Assise, pl. 267. cites 26 Ass. 36.

2. A feme was seised, and took baron, and they distrained for the rent, and rescous was made, and they brought assise of the * rent, and well, though the baron was never seised thereof: for seisin of the feme shall serve the baron, so that both upon such seisin shall have assise; quod nota. Br. Seisin, pl. 17. cites 8 Ass. 4.

Br. Assise, pl. 131. cites S. C. — S. P. Br. Seisin, pl. 34. cites 3 Ass. 8. & 34 Ass. 3. * Orig. 12 (retorne.)

3. If a man has rent of right, there by whosoever hands he shall get seisin of is, if it be by such hands against whom præcipe quod reddat lies, this is good seisin to have assise. Br. Seisin, pl. 19. cites 8 Ass. 16. by Several.

* If a man
grants com-
mon to W.
B. for years,
and the

4. And by some, seisin had by the hands of a * termor or guardian suffices to a purchaser of a rent; *quære inde*. Br. Seisin, pl. 19. cites 8 Aff. 16.
lessee is disturbed after seisin of it, the lessor shall have assise of this seisin of the termor; per Seton and Mowbray. Br. Seisin, pl. 36. cites 22 Aff. 84.

And if a man leases land for years, and dies, and the termor is ousted, the heir shall have assise by seisin of the termor. Br. Seisin, pl. 36. cites 22 Aff. 84.—S. P. for the profits taken by the termor is seisin of the heir. Br. Assise, pl. 31. cites 45 E. 3. 25.

So if the reversion of tenant for term of years be granted to me by fine, and the termor is ousted I may have assise before attornment; per Perle, quod non negatur. Br. Assise, pl. 35. cites 48 E. 8. 16.

[311] 5. In assise of rent by an infant it was found, that the father of the infant leased the land to the tenant for term of his life, rendering the rent, and died, and the lord entered into the land claiming it for the heir in ward, and took the profits the day of the writ purchased; and therefore it was awarded, that the infant plaintiff was tenant of the franktenement by the entry of the lord, by which he took nothing by his writ; quod mirum, that the lord by wrong may make the heir to be tenant of the franktenement in spite of his teeth, and especially against an infant; therefore *quære*. Br. Assise, pl. 164. cites 11 Aff. 6.

6. In assise it was found, that M. was seised of 13s. rent-seck, and had issue A. & B. and A. had issue J. S. and died, and after M. died, and B. took the ward of J. S. because she was within age, and received the rent all to his own use, and nothing to the use of J. S. and was afterwards deforced of the rent, and brought assise. The defendant said, that B. had nothing unless in common with J. S. not named &c. and if, &c. And because the seisin of one is the seisin of both, notwithstanding the matter above, therefore by award the writ was abated; quod nota. Br. Seisin, pl. 26. cites 36 Aff. 1.

* S. P. F.
N. B. 179.
(F)—+ S. P.
F. N. B.
179. (F)

7. Where the * lessee for years, or the tenant by elegit, † tenant by statute merchant, statute staple &c. are ousted, the lessor, conusor, or he in reversion of the franktenement shall have assise but shall not recover damages. Br. Seisin, pl. 18.

8. Seisin of the rent of the father shall not be sufficient seisin for the son to have assise of rent if rescous be made to him of the rent; because the father has the rent in his own right, and the son shall have the same in his own right, and then he ought to have a new seisin. F. N. B. 179. (C)

(C. 2) Seisin of one Thing where Seisin of another.

1. A MAN gave in tail, reserving rent, and had issue bastard eigne and mulier puisne, and died; the bastard got seisin of the rent reserved, and died thereof seised, the mulier has by this lost the reversion. *Quære inde*; for seisin of the rent is not seisin of the reversion, by some elsewhere. Br. Seisin, pl. 43. cites 14 E. 2. & Fitzh. Bastardy 26.

Br. Seisin,
pl. 40. cites
E. 6.

2. By seisin of fealty upon a grant of seignory assise does not lie of the rent; for it is no seisin: But avowry lies; for it is good attornment. Br. Seisin, pl. 7. cites 49 E. 3. 14.

3. It was held by the justices of both benches, that where a man holds by rent and service of chivalry, and the lord and his ancestors have been always seised of the rent, but not of the homage, escuage, nor of the ward, yet if ward falls he shall have the ward of the heir; for the seisin of the rent suffices to be seised of the tenure as to this purpose. But otherwise it seems to make avowry. Br. N. C. pl. 430. cites 6 E. 6.

So it was agreed for law in C. B. that if the lord had not been seised of homage within time of memory but had been

seised of the rent, this is sufficient to have writ of ward, and to count that he died in his homage; for there is seisin of something, though it be not of the whole services: and for this cause, and also inasmuch as the seisin is not traversable, but the tenure, therefore the action lies without seisin of the homage. Br. N. C. pl. 425. cites 7 E. 6.—Jenk. 206. pl. 34. cites S. C.

4. Lord and tenant by service to pay yearly such a quantity of salt, but since 10 H. 7. money had been always paid instead of salt. Manwood took a difference, that if the sum had varied every year according to the price of the salt, then the payment of the money had been a sufficient seisin of the salt; but if the payment was of a sum certain for the salt, then it is otherwise; quod fuit concessum: per Curiam. Le. 226. pl. 356. 20 Eliz. C. B. Annon.

(D) Seisin Actual. What Act in Law will make [312] Actual Seisin.

[1.] IF a return irreplegiabie be adjudged to the avowant upon the matter; this will make a good seisin to him. (It seems it is intended actual.) 2 H. 4. 23.]

[2. If a return be awarded for cause of rent arrear, this shall not be sufficient seisin whereupon to have assize without other seisin. 21 E. 3. 22.]

3. Admission and institution of a clerk is no seisin for the patron to have writ of right of advowson; for there he shall allege esplees, as in grossis decimis, minutis decimis, &c. which cannot be without induction, which is seisin in fact. Br. Seisin, pl. 20. cites 38 E. 3. 4. Per Thorp.

4. If my father dies seised, and none enters, there is seisin in law in me, and præcipe quod reddat may be well brought against me; per Yelverton quod concordat. Nat. Brev. tit. Dote unde nihil habet, but by him if one abates the writ shall be brought against him; for there is tenant of the franktenement in fact by this. Br. Seisin, pl. 13. cites 21 H. 6. 8.

(E) What Act of the Tenant will be a Seisin actual in Law.

[1.] IF the tenant attorns yet this does not make an actual seisin of services. 49 E. 3. 15. b.] Co. Litt. 159. b.

2. Using of common by tenants at will is sufficient seisin for him in reversion to have assize of common, if he or his tenant at will be disturbed.

disturbed. Kitch. of Court Leets 123, 124. tit. Seisin in Assize cites 22 assize accordingly. Fitzh. fol 120.

See Avowry.

(E. 2) Actual Seisin. *Necessary* in what Cases.

1. **O**F *things transitory* the law adjudges *possession* without seisin as of the body of award. Br. Hariots, pl. 9. cites 13 E. 3.

2. Seisin in law is sufficient for the making avowry; but as to *the bringing assize*, it is necessary that there be an actual seisin; *so likewise to have a writ of right* of the land, there must be actual seisin. 4 Rep. 9. a. in Bevil's case, cites 35 E. 3. Tit. Droit 30. and Litt. lib. 3. cap. releases 112.

3. *Lands descended to A.—J. S. entered, and A. claimed by parol in the vill where the lands lay, and durst not enter for doubt of death, but brought assize; and this claim adjudged good seisin.* Br. Seisin, pl. 37. cites 38 Ass. 23.

[313] 4. Assize is not maintainable against him which has but a *freehold in law*; for of that seisin an assize does not lie, and yet of that seisin a wife shall be endowed. Kitch. of Court Leets 122. Tit. Seisin of Assize, cites Litt. fol. 152.

(F) *By what Thing* it may be given.

Kelw. 3. b. [1. **I**F the tenant attorns, and pays to the lord *an ox or cow* (in pl. 6.—See name of *seisin of the rent*) this is a sufficient actual seisin of (A) pl. 6. the rent. 49 E. 3. 15. b.]

See (A) pl. 7. 8. [2. So if upon a recovery of a rent, the sheriff puts him in seisin by an ox; this is sufficient actual seisin. 49 E. 3. 15. b.]

The sheriff upon recovery of rent cannot put the de- [3. [So] if the sheriff puts the recover or of a rent in seisin by a branch upon the land in lieu of execution; this is sufficient actual seisin. 49 E. 3. 15. b.]

mandant in seisin of it by the goods and chattles of the tenant, as oxen, &c. But he may put him in seisin by a *clod of the land* charged, or a branch, or grass growing upon the land charged; per Laken, quod Moile concessit. Note the Diversity. Br. Seisin, pl. 15. cites 37 H. 6. 38.

• S. P. "Or by delivery of any goods which are upon the land of any man upon recovery, though it be of a thing which is not of the nature of the land. Br. Seisin, pl. 14. cites 37 H. 6. 33. — But otherwise it is, as is said elsewhere, of grant of rent; for there the seisin is not good, unless it be of a thing of the nature of the rent, or parcel of it. But it is good upon recovery; for the sheriff cannot do otherwise; for he cannot take the money of the tenant out of his purse to put the party in possession. Ibid. cites 37 H. 6. 33. and 39 H. 6. 26.

4. The delivery of a pledge in name of attornment is no seisin. Br. Assize, pl. 207. cites 16 Ass. 15.

5. Writ of entry of rent; the demandant recovered against a person of the rent, and sued habere facias seisinam, by which the sheriff put him in possession by payment of 2d. of the money of the tertenant, who was no party to the recovery; this is good seisin to have assize, if rescous be made after. Br. Seisin, pl. 14. cites 37 H. 6. 33.

6. Incroachment of a thing of another nature does not give seisin to the lord of this thing. Per Frowike Ch. J. Kelw. 73.

(G) The

(G) The Seisin of *whom*, [Or by *whom*,] will serve for others. Corporation. [Or others.]

[1. **T**HE seisin of a *rent-service or seck by a prior*, is sufficient for the successor to have assise without seisin, by himself, if the house has not been put out of possession, because the house is always seised. 49 E. 3. 14. b. adjudged. 26 Ass. 35. by Wilby. But quære. 34 H. 6. 46. Curia.] So the warden of an hospital shall have an assise of rent, where his predecessor was seised, and not himself; for the *seisin of the predecessor* is the seisin of the house. Kitch. of Court Lects 122. Tit. Seisin of Assise, cites 15 Ed. 3. Tit. 39. accordingly of an abbot or prior. Fitz. fol. 179. c. and 8 Ass. 16.

[2. A seisin of a *rent by a chaplain of a chantery*, is sufficient seisin for his successor to have assise. 34 Ass. 3.] Br. Assise, pl. 335. cited S. C. ——— Br. Seisin, pl. 34. cites S. C. and 3 Ass. 5. ——— Kitch. of Courts Lects 122. Tit. Seisin in Assise, cites S. C.

[By whom. Others than Corporation.]

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[3 Seisin of *services by the hands of a * disseisor, or [one] who has a † defeasible title*, is sufficient to bind him who has right, if it be without covin. Co. 6. Brediman 57. b.] * S. P. Br. Seisin, pl. 19. cites 8 Ass. 16 — S. P. per

Culpeper, if it be of such services which the lord of right ought to have. Br. Seisin, pl. 8. cites 11 H. 4. 2.

† S. P. *As* where there is *lord and tenant*, and the *tenant within age infeoffs R. N. by whose hands the lord gets seisin of the rent*; this was adjudged a good seisin, though the infant re-enters. Br. Seisin, pl. 19. cites 8 Ass. 16.

But seisin by *wrong upon an unlawful patent*, was thought by the judges to be of no force. Arg. Noy. 176. cites 13 H. 4. 15.

[4. If the *tenant makes feoffment, yet if he after gives seisin of the services to the lord before notice of the feoffment*; this shall bind the feoffee, and shall be sufficient to have an assise, because he was tenant as to the avowry. Co. 6. Brediman 58.] Ibid. cites 8 H. 6. 18. For in such case, if the lord avows

upon the feoffee before tender of the arrearages, he shall lose them, as is agreed in 7 E. 3. and 6 H. 4. &c. and therefore since in such case the common law compels the lord to avow upon the feoffor; therefore at common law such seisin by the feoffor was good *causa necessitatis*.

[5. If *tenant in tail makes feoffment in fee, and after discontinuee gives seisin of the services*; this shall be sufficient to have assise, and yet he could not avow upon the discontinuee, nor is there any privity between them. Co. 6. Brediman 58]

[6. If a *lessee for years of land gives seisin of a rent-seck, this shall not be any seisin to have an assise thereof against him in reversion after the years expired. Co. 6. Brediman 56. b. 57. for the imbecility of the estate for years, which cannot charge the frank-tenement.]*

Fol. 465.

The case was, that B. seised in fee of a

manor, devised a rent out of it to J. S. for life, and devised the manor for 15 years to W. R. — W. R. entered into the land, and paid the rent to J. S. After the 15 years ended J. S. brought assise against the remainder man. Resolved that this is not a sufficient seisin; for it is a payment only,

only, and not a seisin; for a lessee for years cannot bind or charge the freehold. And Coke Ch. J. gave 5 several reasons that it could not be a seisin to maintain an assise. 1st, In respect of the imbecility of the estate which the lessee for years has. 2dly, Seisin is always in the reality. 3dly, Lessee for years by his possession may take seisin for him in reversion, but he cannot give seisin; and lessee for years, bailiff or guardian, may take seisin, but they cannot give seisin. 4thly, Because it is remediless; for tenant for years cannot make a rent seek to be good which was not good, viz. to have remedy for it; and redditus ficcus before seisin, is not assets. 5thly, Diverse inconveniences would ensue if it should be a seisin; but he did not shew what: wherefore it was adjudged for the defendant. Cro. J. 142. pl. 20. Mich. 4. Jac. in B. R. Brediman. v. Bromley. — S. C. by the name of BREDIMAN's case, 6 Rep. 56. b. where the first 4 resolutions are illustrated, and many reasons given; and as to the 5th resolution, (of which Cro. J. 142. says that Coke did not shew what the inconveniences therein mentioned were) the book says, by this means *tenant by statute merchant, or staple, or elegit and guardians, grantees of wards, &c.* and also if *the king* extends and leases over, all of them might put the lords or owners of rents in possession of rents or services, of which they had no seisin within time of limitation, which would be full of peril and danger, and occasion many suits and troubles. And as to an objection, that *payment by a bailiff* shall be a sufficient seisin, it was well agreed to be so, *unless it should occasion special prejudice to the lord*; as if the lord had not been seised of the rent within 60 years, and the tenant makes one his bailiff generally of his manor, he cannot, without express command of his master, pay this remediless rent to the lord, because it will be a special prejudice to him, which a bailiff without commandment cannot do. — 2 And. 185. pl. 106. S. C. says it was held by all the Justices of Bank, that this was sufficient seisin to maintain the assise; for if the devisee of the rent had distrained, and the tenant for years had sued replevin, and made avowry for this rent, and all the matter of the case before had appeared in the record, a return should be awarded, and it should be irreplegiable; but in this case, if he pays the rent, &c. he shall have restitution of the beasts taken, &c. and then the devisee of the rent is seised. — F. N. B. 179. (H) in the new notes there (d) says, if one as sue a return on an award in replevin, this is no seisin of the rent; for by the judgment in the avowry, he shall not recover any rent, but only a pledge; and therefore it is adjudged, that upon a judgment by [501] the avowant for rent, *scire facias* lies for the arrears for which the avowry was made, and no others.

[315] 7. Seisin of the lord of the ward is sufficient seisin for the infant to bring assise. Br. Seisin, pl. 18. cites 8 Aff. 6.

It was found in assise, that the father of the plaintiff was seised of the common, and died seised, and the plaintiff as heir commanded his servants, who were 8. If a man grants *common for life*, and the grantee uses it by another's beasts by assent of the grantor; this is good seisin to have assise: but if the grantee of himself commands his tenant at will to put in his beasts, this is no seisin to have assise; per Thorp. Br. Seisin, pl. 36. cites 22 Aff. 84.

9. And he who has common, and has no beasts, may put in the beasts of another man in the common to take seisin, and chase them out immediately; this is good seisin, and no tort to the tenant of the land: *quære* of the whole; for it was not adjudged. Br. Seisin, pl. 36. cites 22 Aff. 84.

tenants at will in the same vill, to put their beasts into the common in his name, who did accordingly and the lord of the soil took the beasts, and the plaintiff brought assise, and recovered upon this seisin by award; and therefore this was assigned for error. And by the best opinion, this is no seisin to the plaintiff, because it was not with his proper beasts, or with any which he had in his keeping to plow his land, nor with cows taken in for their milk, or sheep to compeller his land, &c. For of such beasts he shall have trespass, and therefore good seisin with them. Contra of beasts of his tenants at will; there he has nothing to do, and therefore shall not have trespass of them, nor is it good seisin with them; but Thorp held strongly, that he may borrow another's beasts to take seisin, and chase them out immediately, but cannot suffer them to remain and take profits. Br. Seisin, pl. 5. cites 45 E. 3. 5. — Br. Common, pl. 5. cites S. C.

If land descends to two coparceners, and the one enters into the whole, 10. Baron seised in jure uxoris, had issue 2 daughters, and aliened, and then he and his feme died, and the one daughter entered, claiming to her and her sister. But per Cur. This shall not vest seisin in the other sister; for the entry was not lawful. Br. Seisin, pl. 45. cites 27 Aff. 68.

claiming to her and her sister; this is seisin of both. Br. Seisin, pl. 44. cites 21 E. 3. 27. — Contra if she claims all to herself only; note the diversity. Ibid.

II. In

11. In *scire facias* upon a fine levied of rent, the tenant said that demandant had received 16s. parcel of the same rent pending the writ, *by the hands of J. S. who held the land* (out of which the rent issues) *at will*, and took his plea to the whole, because the said rent was rent-service, and seisin of parcel gives seisin of all, and so the fine is executed by this seisin. Whereupon the plaintiff demurred, and it was awarded that he should answer to the residue; whence it appears, as it was objected, that seisin by the hands of tenant at will *was sufficient seisin as to so much as was paid*. Arg. 6 Rep. 57. a. in Brediman's case, cites 27 E. 3. 83. a.

This case was well agreed. Per Cur. 6 Rep. 59. (f) in Brediman's case.

12. Replevin by E. against the abbot of M. who made avowry upon S. because N. was *seised of the land of which, &c. and infeoffed S.* and the plaintiff said that N. was *seised in jure uxoris, and E. and his feme died, and S. son and heir of the feme, in whose right the baron was seised, infeoffed S.* and so the defendant has mistaken the avowry: and the best opinion was, that the avowry shall abate; for the plaintiff is not in by him, by whom he supposed the seisin: and per Thirn. *seisin of the homage by the hands of baron seised in jure uxoris is good seisin*. Quære, because he might have had it by the hands of the feme also, and also the baron alone is not tenant to the lord before issue had by his feme. Br. Seisin, pl. 8. cites 11 H. 4. 2.

13. If *tertenant* of land, out of which a rent-charge is issuing, be *disseised*, and he that has the rent grants it over, the disseisee cannot attorn, because he has not franktenement, though he has the meer right thereto. And seisin is more than attornment; for every lawful seisin includes attornment, but attornment does not include seisin. 6 Rep. 59. a. Per Cur. in Brediman's case, cites 21 H. 6. 9. b.

14. If a man *holds of the king, and holds other land of another lord, and dies, his heir within age, who intrudes at his full age, and pays the rent to the other lord*; this is good seisin, and shall bind him after he has sued livery; for the *seigniority was not suspended by the possession of the king, but only the distress*; for after livery the other lord may distrain for the arrears due before, by the best opinion then. Brooke says, see now the statute thereof 3 E. 6. 8. Br. Seisin, pl. 48. cites 34 H. 8.

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15. The seisin of the *guardian* shall give seisin to the ward to have an assise, if he be disseised. F. N. B. 179. (F)

16. *So of tenant by statute merchant*. F. N. B. 179. (F)

17. *So of seisin by the hands of tenant for life*. F. N. B. 179. (F)

But as to these several points, see pl. 6. and the notes there, out of Brediman's case, &c.

18. *So it seems payment of the rent by the tenant for years of the land, is a sufficient seisin to have assise of the rent, if it be afterwards denied*. Tamen quære. F. N. B. 179. (F)

19. Seisin of a *rent by the hands of one jointenant*, is good for all. Co. Litt. 315. a.

As, where lord and 4 jointenants

are, and the lord grants the rent or service to J. N. and the one tenant pays the rent; this is good seisin; and if he dies and the others survive, yet this is good seisin; for all need not to be at the payment of the rent: and yet *contrary of attornment*; for rent may be paid by bailiff or servant, and so a good payment for all; but attornment cannot be but by the tenant himself, and therefore it is only attornment for one moiety; by the best opinion. Quære; for it was not adjudged. Br. Seisin, pl. 16. cites 39 H. 6. 2.

20. Where

20. Where *rent is issuing out of a whole vill*, and to be paid by all the inhabitants, in which case seisin cannot be alleged by the hands of any person in certain, seisin given by one shall bind all. 6 Rep. 59. b. in Brediman's case.

(H) *For whom the Seisin shall be sufficient.*

But otherwise it is, if a man gives land upon condition, and the condition is broken, the old seisin is not sufficient, but he must enter and gain a new seisin. 4 Rep. 9. b. Bevill's case.

[1.] IF a man *seised of a feignory, grants it over upon condition, and the tenant attorns, and after the condition is broken, and the grantor distrains, his first seisin shall be sufficient to maintain an assise.* 15 E. 3. Assise 95.

2. Lord and tenant by fealty and rent; the lord is in seisin of his rent, he *grants his feignory to another and to his heirs upon condition; the tenant attorns and pays his rent to the grantee; the condition is broken; the lord distrains for his rent, and rescous is made; he shall be in his former estate; and yet the former seisin shall not enable him to have an assise without a new seisin.* Co. Litt. 202. b.

See Dower.

(I) *Instantaneous Seisin.*

Cro. J. 615. 1. JOINTENANT makes a *feoffment* of his moiety, his wife shall not have *dower*; for the dowable estate was but for an instant. Jenk. 105. pl. 1.
18 Jac. B. R. S. P. Per Cur. in the case of Amcott v. Kelerich, cites 34 E. 1. Dower 178.

2. Possession for an instant is sufficient to support the *increase of the fee.* 8 Rep. 76. in Lord Stafford's case, cites 12 E. 2. Voucher 265.

[317] 3. Instantaneous seisin *by fine levied*, and which is only in supposition of law, is *of no regard* in law. Arg. 2 Jo. 58. in the case of Brown v. Waine, cites 1 Inst. 30. 3 H. 4. 6. a. & 2 Roll. Rep. 472. 1 Cro. 172. Cress v. Gayer. & Jo. 106, 107. & Cro. J. 616.
2 L. e. 170. S. P. and the Court held, that a forfeiture for treason cannot attach upon such an instantaneous seisin gained by the fine. Trin. 28 Car. 2. B. R. Browne v. Waite.—Vent. 299. S. C. and there 301 is S. P. but said to be only argued and not touched upon by the judges, they being fully agreed upon another point.

4. Tenant at will or years makes feoffment in fee and dies, the wife brings *dower*; the feoffee pleads, *ne unque seisie que Dower.* But tota Cur. against him; for he has gained the fee in an instant. Cited per Jones J. Jo. 317. as Matthew Taylor's case, 34 Eliz. C. B.

5. A fee simple gained in an instant *need not be traversed.* Lane 94. in the case of Wentworth v. Stanley.

6. Grantee of a rent-charge levies a *fine* to the use of conusors and

and their heirs; the *arrears of rent* are gone by the seisin for an instant of the conusor; per 3 J. Contra Vaughan Ch. J. Vaugh. 36. Dixon v. Harrison.

(K) Pleadings.

1. **O**NE pleaded, *that his father was seised, and died seised, &c. and shewed not of what estate:* and ill, because a title made thereby. Heath's Max. 147. cap. 6. cites 24 E. 3. 75.

2. *But in a replevin of beasts taken damage feasant, where the question was, who ought to keep the inclosure?* the avowant said, that he was seised in his demean as of fee, &c. which was traversed by the defendants. The opinion of the Court was, that he *need not* in this case *shew any estate whereof he is seised;* because, touching this matter, his estate is not material. D. 365. pl. 32. Mich. 21 & 22 Eliz. Sir Francis Leake's case.

But in replevin for taking his cattle, &c. defendant avowed the taking, for that he temporary quo. &c. seistus fuit,

and is still seised of the place where, &c. and for that the cattle were there damage feasant, he took them, &c. The plaintiff demurred specially, and shewed the incertainty of the avowry for cause of demurrer; for that the defendant did not set forth of what estate he was seised, either in fee simple, fee tail, or for life, &c. but only a general seisin, which is not traversable; and this was adjudged ill, and held for substance. Thereupon the defendant prayed leave to amend, upon payment of costs; to which the plaintiff consented. Carth. 9. Trin. 3 Jac. 2. B. R. Sanders v. Hussey.

3. In quare impedit, per Thirn. and Hill clearly, that *purparty* may be of an *advowson* and agreement to present by turn, and *rent reserved upon equality* of partition, without deed; contra of a grant of such things; and after, where the defendant alleged it to be allotted to the purparty of one daughter the plaintiff alleged it to be to the other daughter, and does not shew deed thereof; and well, because he has *alleged 2 presentments in his ancestor* in the declaration. But *mirum inde; for he does not make conveyance from that daughter to whom he alleged the allotment.* Br. Monstrans, pl. 32. cites 11 H. 4. 3.

4. In recordare the *defendant made conusance because the king is seised of the castle of C. in right of his dutchy of C.* which king and duke have had 20s. rent out of the vill of D. where, &c. payable yearly at Michaelmas; and that the king, in right of the dutchy aforesaid, and all dukes of C. have been seised time out of mind by the hands of the resiants in the same vill; and that when it was arrear, they used to distrain time out of mind; and for so much arrear at Michaelmas last, he, as bailiff of the king, distrained, and prayed aid of the king, and had it, and the conusance awarded good by advice of all the Court; quod nota upon a commonalty without expressing a corporation or seisin by the hands of any person certain, but only by the hands of those who were abiding and resiants there; quod nota bene. Br. Prescription, pl. 31. cites 4 H. 6. 29.

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5. In assise the plaintiff pleaded a fine levied to him by A. B. *sur conusance de droit and sur release and quit claime:* this is no plea if he does not allege seisin in A. B. at the time of the fine, &c. Br. Pleadings, pl. 146. cites 10 H. 6. 21.

Br. Titles, pl. 59. cites S. C. — And he who pleads a release of all

the right, &c. ought to aver, that he to whom it was made was tenant of the land at the time of the release. Br. Pleadings, pl. 146. cites 10 H. 6. 21.

Br. Titles, pl. 59. cites S. C.—So upon recovery by default pleaded against the demandant himself. Br. Pleadings, pl. 146. cites 10 H. 6. 21.

7. In action upon the case for not finding a chaplain to chaunt in his manor for him and his servants; the plaintiff need not allege seisin, as in assise; for this is only trespass for damage. Br. Seisin, pl. 46. cites 22 H. 6. 46.

Heath's Max. 145. cap. 6. cites S. C. 8. A man intitled himself to a way by prescription; and said, that he was seised thereof *in dominico suo ut de feodo & de jure*; quod nota. Br. Pleadings, pl. 152. cites 30 H. 6. 7.

Heath's Max. 145. cap. 6. cites S. C. 9. In a *quare impedit*, the plaintiff counted, that the king was seised of the advowson in gross in dominico suo ut de feodo et jure, and granted, &c. and did not say, *in jure coronæ vel ducatus*, or by purchase, &c. and yet good: for there is no other form. Br. Count, pl. 18. cites 34 H. 6. 34.

Heath's Max. 146. cap. 6. 10. If an estate be made to 2, and to the heirs of one, the pleading shall be *they were seised*, viz. the one in his demesne as of fee, and the other in his demesne ut de libero tenemento. Br. Pleadings, pl. 125. cites 37 H. 6. 24.

Heath's Max. 145. cap. 6. cites S. C. 11. Tenant for life by copy shall say that he is seised *in dominico suo ut de libero tenemento secundum consuetudinem manerii*, &c. Br. Pleadings, pl. 114. cites 21 E. 4. 80.
Br. Tenant per Copy, pl. 13. cites S. C.

Heath's Max. 145. cap. 6. cites S. C. 12. In trespass the defendant said, that the place where is one acre of land, of which he and Alice his feme were seised in their demesne as of fee before the trespass and at the time of the trespass, and the defendant entered, and did the trespass, and exception was taken, inasmuch as he did not say that they were seised in jure uxoris, or conjunctim, et non allocatur; for per Fineux Ch. Just. it is sufficient for the defendant to entitle himself to any part of the land in whatsoever manner it be. Br. Pleadings, pl. 84. cites 12 H. 7. 24.

Br. Pleadings, pl. 47. cites S. C. 13. In debt the plaintiff counted that he demised tenements, &c. for term of years rendering rent, &c. and by award the count is good, quod dimisit, without saying that he was seised and demised. Br. Count, pl. 50. cites 21 H. 7. 26.
19. cites 34 H. 6. 48.—Br. Monstrans, pl. 10. cites S. C.—Heath's Max. 145. cap. 6. cites S. C.

Br. Pleadings, pl. 47. cites S. C. 14. So in *formedon*, the writ and count is that he gave, and not that he was seised and gave. Br. Count, pl. 50. cites 21 H. 7. 26.

[319] 15. So in *cui in vita*, &c. which is by writ or count. Br. S. P. Br. Count, pl. 50. cites 21 H. 7. 26.
19. cites 34 H. 6. 48.—Br. Monstrans, pl. 10. cites S. C.—S. P. Br. Pleadings, pl. 146. cites 10 H. 6. 21.—Br. Titles, pl. 69. cites S. C.—Heath's Max. 145. cap. 6. cites same cases, & 9 H. 4. 5.

In count, writ, or office, a man may say that J. N. gave to J. P. in tail, without shewing that he was seised, and gave. Br. Count, pl. 88. cites 15 H. 7. 6.—So of rent. Br. Count, pl. 88. cites 15 H. 7. 6.

16. *But in pleading, as bar, replication, &c. he shall say that he was seised and leased, gave, &c. quod nota diversity.* Br. Count, pl. 50. cites 21 H. 7. 26. Br. Pleadings, pl. 47. cites S. C.—S. P. Br. Count, pl. 88. cites 15 H. 7. 6. S. P. Br. Count, pl. 19. cites 34 H. 6. 48. Br. Monstrans, pl. 10. cites S. C.

17. *Lands were given to the baron and feme, and the heirs of the body of the feme.* And per Fitzh. in pleading, the entry shall be *quod vir & uxor fuerunt seisi' simul, & haered. de corpore uxoris*, and shall not say that the one was seised ut de libero tenemento, and the other as in tail. Quære inde. Littleton cap. tail says in the same case, that the feme has tail general, and the baron but for life Br. Pleadings, pl. 3. cites 27 H. 8. 21. Heath's Max. 146. cap. 6. cites S. C.

18. Note for law, that it is good pleading to say, *that J. N. and W. were seised in their demesne as of fee to the use of T. P. and his heirs, without shewing the commencement of the use*, as to say that A. was seised in fee, and infeoffed J. N. and W. to the use of T. P. &c. Br. Pleadings, pl. 160. cites 36 H. 8.

19. In assise brought of a portion of tithes, which came to the King by the suppression of an abbey, and by him granted to the plaintiff, it is sufficient to say that he was seised *in dominico suo ut de feodo*, and better than saying in jure coronæ. D. 83. pl. 77. & 86. pl. 94. Pasch. 7. E. 6. the new Serjeant's case, or the Dean and Chapter of Bristol v. Clarke.

20. Exception was taken to a replication, because it was, that *J. P. master and confreres of such a college were seised of the said manor whereof, &c. in their demesne as of fee, without saying in jure collegii*, for that it may be they were seized in their natural capacity. But all the Court held the exception not good, for when it is said that they were seised in fee, it can have no other intendment, but that it was in right of the college; for the corporation cannot be intended seised to any other use. Pl. C. 102. b. 2. Mar. in the case of Fulmerstone v. Steward. D. 103. a. pl. 5. S. C. & P.—But otherwise of a dean, parson of church, or prebendary. Pl. C. 103. a. S. C.

21. It was argued, that of such things whereof a man shall have assise, he shall say in his count that he was seised in his demesne as of fee; but if the reversion had been *depending on an estate for life*, there he might say, as of fee and right; but that where the reversion is *upon an estate for years*, as in the principal case, he might say in his Demesne as of fee. But to this it was answered by the court that true it is, he might have said so, and it would have been good, and that the other form of pleading is good also: for when a man has made a lease for years, he cannot de jure meddle with the demesne, but *Demesne is properly said, when one has the thing in possession*, by which a man may say of a reversion depending on an estate for years, as well as if it were depending on an estate for life, that he was *seised as of fee*, and so the exception was over-ruled; per Cur. Pl. C. 191. a. 1 Eliz. in the case of Wrottesley v. Adams. Heath's Max. 146. cap. 6. cites S. C.

22. Exception was taken to the plea of a dean and chapter, because it was, that they were seised *of the parsonage of D. in right of the cathedral church*, but this was said to be well; and a difference was taken when the plea is of the whole and when of parcel; for if

if they were disseised of one acre parcel of the parsonage, and they had said, that they were thereof seised, they ought to say *in jure ecclesiæ suæ de D.* and cited * the case in 49 H. 6. 16. where the abbot of Colchester, parson of a church, claimed an annuity appertaining to the said rectory, he ought to prescribe *in jure rectoriæ*, and not that he and his predecessors abbots have had it time out of mind; because of parcels of things, and things appertaining to a rectory, they ought to be claimed in right of the rectory; but in the principal case it is alleged, that they were seised of the parsonage and church of D. which is the whole, and of the whole they were seised in jure of their cathedral church, which is true, and it would be absurd to say that they were seised of the church of D. in jure ecclesiæ de D. or of the rectory and church of D. in jure ecclesiæ de D. Pl. C. 503. b. Mich. 18 & 19 Eliz. in the case of Grendon v. Bishop of Lincoln.

23. Where a defendant alleges a seisin in A. from whom he claims, the plaintiff cannot allege a seisin in B. (from whom he claims) before the seisin of, &c. without traversing, confessing, or avoiding the seisin alleged by the defendant. Cro. E. 30. pl. 2. Trin. 26 Eliz. B. R. Hering v. Blacklow.

The reporter says, that there seems to be another material objection to the replication, viz. that it ought to have been, that before the said Alice Catmere any thing had, &c. For the title under which the defendant justifies, is originally derived from Alice;

24. In trespass, &c. the defendant pleaded, that Alice Catmere was seised in fee, and devised, &c. to Thomas Catmere and his heirs, under whom the defendant justified. The plaintiff replied, that before Thomas Catmere any thing had, &c. H. and F. S. were seised in fee, and made a lease of the lands under which the plaintiff claimed; and upon demurer to this replication it was objected, that the bar was neither answered and avoided, or traversed: for it may be true, that H. and F. S. were seised in fee, and yet Alice Catmere might be seised in fee before; and be disseised by H. and F. S. and that she had re-entered, and died seised: but adjudged for the defendant; and tho' when a seisin in fee is alleged, it must be intended a lawful seisin till the contrary be shewn, yet the fault in the replication (admitting that the misprision of Thomas Catmere for Alice Catmere, had not been in the case) is, that the seisin in fee of Alice, alleged in the bar, ought to have been confessed and avoided, traversed or denied, which is not done. 2 Lutw. 1337. 1342. Trin. 2 Jac. 2. Meriton v. Benn.

and therefore the plaintiff ought to surmount the title of the said Alice, or to confess that she was seised in fee, and derive a title from her; and cites the case of FAKINS v. HOLT. Litt. Rep. 353. where in quare impedit the plaintiff declared, that R. H. was seised in fee, and presented F. &c. and the incumbent pleaded that before R. H. presented F. &c. Et per Tot. Cur. The plea was ill; for the course of pleading is, that before the said R. H. any thing had, &c. Ibid. 1342, 1343.

For more of Seisin in general, see Abbotcy, Limitations, Traverse, and other Proper Titles.

Seizure for the King.

(A) Statutes relating thereto.

1. By 3 E. 1. cap. 24. **I**t is provided, that no escheator, sheriff nor other * *Themisebiſ before this statute was,*

bailiff of the king, that escheators, sheriffs, and other of the king's bailiffs, would colore officii, seise into the king's hands the freehold of the subject, and thereby disseise the party, who thereupon, to his intolerable vexation and delay, was put to his suit to the king by petition, for which this statute provides remedy. 2 Inst. 206.

* Here by bailiff is understood any other officer or minister of the king's. 2 Inst. 206.

By colour of his office,

Colore officii is ever

taken in malam partem, as virtute officii is taken in bonam; and therefore this implies a seizure unduly made against law. 2 Inst. 206.

And he may do it colore officii 2 manner of ways; either when he has no warrant at all, or when he has a warrant, and does not pursue it. 2 Inst. 206.

Without special warrant,

That is, to the escheator,

&c. 2 *diem clausit extremum, mandamus*, or any other of the king's writs, and office thereupon found for the king. 2 Inst. 206.

Likewise to the sheriff the king's writ, as an *habere facias seisam*. or the like. 2 Inst. 206.

By this act no seizure can be made of lands or tenements into the king's hands, before office found; and so is the common experience at this day. See the statute of Articuli super Cartis cap. 19. and 29 E. 1. the statute of Lincoln. 2 Inst. 206.

Or commandment,

Under these words are

comprehended not only the king's commandments by his writs, as has been said, but also the commandment of the justices of the king's courts of justice. 2 Inst. 206.

A man was indicted before the sheriff in his tourne of felony; upon which indictment his lands and chattles were by the sheriff seised for the king; afterwards before justices assigned, he was acquitted, and sued out a certiorari to remove the record into B. R. which being removed, he prayed there to have restitution of his lands and goods; and it was resolved, that the sheriff had not warrant to seise the lands, (before he was attainted) and therefore that he should sue his assise against the sheriff upon this statute. It was further resolved, that if the sheriff seise lands by the commandment of the justices, then is the sheriff excused, though the justices therein did err; and if he did it of his own head, then had the party remedy by an assise; therefore the party was required to sue out a writ to the justices, to certify if the seizure was made by their commandment. 2 Inst. 206, 207.

Or authority certain pertaining to his office, disseise any man of his freehold, nor of any thing belonging to his freehold,

That is, ex officio, without any

writ or commandment: for example, when the escheator takes an office virtute officii, he may seise the land; for this, as our act saith, doth belong to his office; but if of his own head (as has been said) he seises the land without any office, that seizure is colore officii, and therefore the assise upon this statute is maintainable against him in that case, & sic de cæteris. 2 Inst. 207.

And if any do, it shall be at the election of the disseisee, whether that the king by office shall cause it to be amended at his complaint, or that

This statute is made in affirmance

of that which ought to have been done by the common law, and is the foundation as well of our book-cases as of the acts of parliament, that after have been made concerning undue seizures by escheators, sheriffs, and other bailiffs or coroners, and the * rest. 2 Inst. 207. — And if it does appear to the Court, that the king's officer doth seize for the king any lands without warrant against the law, in an action brought against the officer he ought not to have any aid of the king; neither doth the writ *de domino regis inconsulto* lie in that case, because that which is done by him, is void; and where the cause of aid fails, there no aid is to be granted. It was against reason that the king, who is the head of justice, should aid him in his wrong; and therefore this act for doing of wrong in the king's name, doth give the party grieved an assise against him, wherein the plaintiff shall recover his land, and double damages, and besides the king's officer shall be in the grievous mercy of the king, for doing injury in his name to the subject. 2 Inst. 207.

Therefore in a real action, if the escheator (of whom this statute speaks) be examined, and upon his examination saith generally, that he has seized the lands in demand into the king's hands; this is not good, and the action shall proceed, for he must shew the cause of the seizure, as is implied in this act, which cause, if it appear to be against the law, the judges of the law ought to disallow the same. 2 Inst. 207.

† This is put for an example; for he may have any other writ or action against him. 2 Inst. 207.

* This seizure is intended after office; for before office lands or tenements cannot be seized into the king's hands; and so is the common experience at this day. 2 Inst. 573. — See the statute of 29 Ed. 1. de escheatoribus, commonly called the statute of Lincoln made the year after this law; and upon these two statutes 20 points are to be observed,

1st, That by the common law, although the seizure was not lawful, yet for the mesne profits upon the livery, or ouster le mayne, the party grieved was not restored to the mesne profits, which mischief is remedied by these two statutes.

2dly, That by the common law, although the seizure was not lawful, yet for the mesne profits upon the livery, or ouster le mayne, the party grieved was not restored to the mesne profits, which mischief is remedied by these two statutes.

3dly, Issues are intended rents and things leviable by the escheator, which may be restored, though the escheator has accounted for them, and not paid; but the money, being once in the king's coffers, shall not be restored.

4thly, That though both these statutes speak only of an ouster le main, yet being both beneficial laws for restitution to be made to the party grieved, by equity they extend to liveries.

5thly, Where the words seem to extend only to seizures before office, and after by the office, that is found, the king is not intitled, yet by construction the same extend only to seizures after office found.

6thly, These statutes extend by equity to ouster le mayne, and amoveas manus upon petitions, and Monstrans de Droits, not only in cases concerning wardship, but freehold and inheritance.

7thly, These statutes extend also, by like equity, to ouster le maynes upon traverses, although traverses were not in use at the time of the making of these statutes.

8thly, By the said statute of 29 E. 1. If any former office of record be found after livery, or ouster le mayne, that maintains the title, by reason whereof the king is seized, the king upon that record shall not re-seize immediately, but thereupon sue out a *scire facias*, &c.

9thly, But if an office be found, which does intitle the king to the land by a title grown to him since the livery, or ouster le mayne, neither of these statutes restrain the king, but that he may re-seize without a *scire facias*.

10thly, There is a diversity when the party has a livery or ouster le mayne upon an insufficient office, or by erroneous process, there, though the party has right, yet the king shall re-seize without *scire facias*; for a livery mis-sued is as if it had never been sued; and the statute of 29 E. 1. is to be understood of a livery, or ouster le mayne, duly and lawfully sued; for that which is insufficient is nothing in law. But when the party sues out his livery, or ouster le mayne, duly and according to law, where in truth he has no right, but the king (if he had been apprised of his title appearing of record) [and so] no livery, or ouster le mayne, ought to have been granted, yet there, upon that record the king cannot re-seize without a *scire facias*.

11thly, Some have holden, that at the common law he that [where one] was in possession of the land,

land, &c. by judgment, as in case of an ouster le maine, livery, or amoveas manum, that no re-seizure could be made for the king without a scire facias, and therein to avoid the former record by matter of as high nature; for the general rules of the law be, nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine, quo ligatum est; et judicia sunt tanquam juris dicta, & pro veritate accipiuntur. 2 Inst. 572, 573.

(B) By whom it may be made.

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1. **I**F exigent is awarded to the sheriff against a felon, by this his goods are forfeited for the disobedience of the law, and the vill, where they are, shall be chargeable with them immediately, and they may seize them any where immediately. Per. Cur. Br. Escape, pl. 39. cites 22 Ass. 81.

2. A man cannot seize goods as waifs, &c. for the king, unless he be bailiff of the king, escheator, or other officer accountant to the king; quod nota; for the party shall plead accordingly; per Prisot for law. Br. Reseiser, pl. 15. cites 39 H. 6. 1.

(C) In what Cases, and of what.

1. **T**HE king may seize for fine for alienation, where his tenant in capite aliened without licence. Br. Seisin, pl. 11. cites 21 E. 3. 44.

But where the tenant of the king has land guildable

beld in capite, and land borough English beld of another, or land in fee simple beld of the king, and land entailed to the heirs males beld of another, and one is heir to him of the one land, and another to the other land, the king shall seize but only that which is descended to the heir general. Br. Reseiser, pl. 40. cites 12 E. 4. 18.—Br. Traverse de Office, pl. 37. cites S. C.—But see 12 Car. 2. cap. 24.

2. So where the bishop makes grant, the king shall seize the temporalities. Br. Seisin, pl. 11. cites 21 E. 3. 44.

3. And where tenant for life, or in tail, does felony, and is attainted, the king shall have their land during their lives. Br. Seisin, pl. 11. cites 21 E. 3. 44.

4. So in case of ward during nonage. Br. Seisin, pl. 11. cites 21 E. 3. 44.

5. And where a bishop dies, the king shall have the possession quousque, &c. Br. Seisin, pl. 11. cites 21 E. 3. 44.

6. So it seems of annum diei & vastum, where a man is attainted of felony; tamen quære. Br. Seisin, pl. 11. cites 21 E. 3. 44.

7. But where a man is outlawed in personal action, the king shall have the profits and not the land itself. Br. Seisin, pl. 11. cites 21 E. 3. 44.

8. If a feoffee confesses feoffment made to him and others by the king's tenant by collusion to defraud the king of ward, the king shall seize all. Br. Reseiser, pl. 39. cites 10 H. 4. N. 50.

9. At this day no seizure is made for the king upon the grand cape, but there is a general allegation of it upon the sheriff's return. Jenk. 122. pl. 45.

(D) In what Cases the King may seise *but not retain.*

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But Ibid.
pl. 19. cites
14 H. 4.
35. that in
case of the
tenant for
life the king
shall not
seise; for
it would be
in vain, be-
cause he
shall make
ouster le
mayne cum

exitibus, and also the writ of diem clausit extremum is quod, &c. de omnibus terris & tenementis unde obiit seistus in dominio suo ut de feodo.

1. **A** MAN holds a manor of the king in capite, and holds another manor of J. N. for term of life, the reversion to W. P. and dies, the king may seise both, but upon suit made by him in reversion, he cannot * retain the manor, but shall make ouster le main, but yet the king shall have the voidance which falls before the ouster le main: and so see where the king may seise and not retain, and see that land for life shall be seised; and yet the prerogative says, unde tenens obiit seistus in dominico suo ut de feodo; and therefore it seems, that he shall have the land held for life by his prerogative at common law. Br. Prerogative, pl. 31. cites 24 E. 3. 59.

(E) At what Time.

Br. Forfeiture, pl. 7.
also S. C.

1. **A** MAN shall not take the goods of a felon before they are forfeited, but may seise and take security that they shall not be essoigned, or put them into the hands of the neighbours to keep. Br. Reseiser, pl. 3. cites 43 E. 3. 24.

2. If tenant for life forfeits his estate to the king for felony, and after dies, the king shall not seise; for his title and cause is determined. Br. Reseiser, pl. 39. cites 8 H. 5. & Fitzh. Traverse, 47.

3. Where the office is found, the king seises immediately upon the office; but where the scire facias is founded upon the patent, there the king cannot seise till the forfeiture or other defect of the patent be tried upon the scire facias 3 Lev. 223. Trin. 1 Jac. 2. in the House of Lords on appeal out of Chancery. The King v. Butler.

See (A) pl. 2.

(F) Livery. In what Cases, and of what.

1. **T**ENANT of the king of certain land had an advowson for life, and died seised and the king seised all; and he in reversion of the advowson came and shewed the matter, and had an ouster le main of the king cum exitibus, and the advowson was void at the time of the ouster le main, and yet the king had this presentment; for by these words (cum exitibus) nothing passed but rents and profits, and not a presentment; and yet before he had this ouster le main, writ issued to the escheator to enquire of the title, which found accordingly, and yet he lost the presentation for that turn; and yet it appears, that the king had no cause to seise. Br. Livery, pl. 73. cites 24 E. 3. 28, 29, 59.

2. If

2. Where the king seised the possessions of a prior alien by general seisure *without cause*, and made livery and general restitution also, there the *advowson passed without expressing* of the advowson. Br. Livery, pl. 29. cites 27 Aff. 48.

3. Where the * king *seises and has no right to seise*, livery shall be made *cum exitibus*; but not where the king seises by right. Br. Livery, pl. 16. cites 7 H. 4. 41.

* S. P. Br. Livery, pl. 36. cites 7 E. 4. 17.

(G) Pleadings.

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1. **I**N trespass for taking 27l. of wool, the defendant pleaded, that in the borough of C. time out of mind, there has been a custom, that it shall be lawful for any burghers of the said borough to seise all the goods bought and sold within the borough to any alien by an alien, to the use of the queen and of such burghers as finds and seises them; and that he was a burgher there, and that before the time of the taking the plaintiff, being an alien, bought the wool of another alien; and that he, being a burgher, seised the same to the queen's and his own use. It was objected, that the prescription does not allege a use in fact to seise; for there can be no prescription unless put in ure. 2dly, He prescribed to seise goods, but does not allege to what use or purpose, as for forfeiture, toll, or custom, or such intent, and the * cause of seisure ought always to be shewn. And for this cause principally the Court was clearly of opinion, that the plea was ill; judgment for the plaintiff, nisi causa. Cro. E. 110. pl. 6. Mich. 30 & 31 Eliz. B. R. Clearywalk v. Constable.

* But where a man shews, that the king has seised certain land, so that the

other cannot distrain there, &c. there the party need not shew for what cause the king seised. Br. Resciter, pl. 5. cites 47 E. 3. 5. — Br. Lect, pl. 8. cites 47 E. 3. 28.

For more of Seisure for the King, see Escheator, Prerogative, Resciter, and other proper Titles.

Sequestration.

(A) What it is; and the Original and Force thereof.

1. **T**HE sequestration is a commission usually directed to seven persons therein named, and empowering them to seise the defendant's real and personal estate into their hands, (or it may be

some particular part or parcel of his lands) and to receive and sequester the rents and profits there, until the defendant shall have answered the plaintiff's bill, or performed some other matter which has been ordered and enjoined him by the Court, for not doing whereof he is in contempt. Curs. Canc. 89.

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a Mod. 258.
S.C. & S. P.
by Atkins J.
according-
ly; for it is
be said, that
the Chan-
cery have
issued such
sequestra-
tions it will
be as bind-
ing as any
other pro-
cess issuing
according
to the rules
of the common law.

2. It was said arguendo, that a sequestration of tithes by a bishop, for not repairing the chancel, does *not bind the interest* nor put the rector out of possession; the not submitting is only matter of contempt, and such a sequestration *out of the Spiritual Court* can no more be pleaded in * *bar to an action of trespass* than a sequestration out of Chancery. But Atkins said, J. he hoped not to see it drawn in question, whether a sequestration out of Chancery may be pleaded in bar to an action of trespass at the com. law, or no; but if it was pleaded, he thought they need not scruple to allow such a plea, by reason the Court of Chancery at Westminster prescribes to grant such a process; which is a court of such antiquity that we ought to take notice of their customs. 1 Mod. 259. pl. 13. Trin. 29 Car. 2. in C. B. Anon.

3. Sequestrations were *first introduced* in the Lord Bacon's time, and then but sparingly used in process, and after a decree to sequester the thing in demand only. Arg. Vern. 421. in the case of the Earl of Kildare v. Sir Maurice Eustace.

4. It was moved for a prohibition to the Court of Chancery, upon a writ of sequestration out of that court, whereby lands were sequestrated; and suggested that the Chancery was only a court of Equity, having only jurisdiction over persons in case of disobedience to their decrees, and not otherwise, and affirmed, that though it were called the High Court of Chancery, yet if it should go against law, or exceed its jurisdiction, they were under controul of B. R. for they upon habeas corpus will deliver one illegally committed by them; and it was said, that *at first* these sort of sequestrations were *only granted in case of personal duty concerning land*; but they ought not to sequester land for debt arising upon a *personal contract not concerning the land sequestered*. But Holt Ch. J. said, you move for a stranger to the bill and answer and proceedings in Chancery; and therefore you must take your remedy at law; you do not tell that you have brought trespass against this sequestrator, and that they stop you by injunction out of Chancery, and no more was done in this matter. Note, the Master of the Rolls said, that that way of sequestration seemed now to have the countenance of an act of parliament, for the statute of

W. 3. did recite it and allowed it. 12 Mod. 313. Mich. 11 W. 3. B. R. Dair v. the Earl of Stamford.

5. The remedy upon a decree to affect the land is only for a contempt whereupon the party proceeds to a sequestration, which process *is not of very long standing*; and that it *is but a personal process*, appears by its abating by the death of the party, and if it would have affected land as a judgment does, it would affect only a moiety as a judgment does, whereas a sequestration takes the whole

whole profits. 2 Wms's Rep. (621.) Trin. 1731. by the Master of the Rolls. *Bligh v. Ld. Darnley*.

6. A sequestration out of Chancery is *more effectual than an execution by fieri facias at law*; for a sequestration may be against the goods, though the party is in custody upon the attachment; whereas in law if a *capias ad satisfaciendum* is executed there can no *feri facias* issue. Cases in Equ. in Ld. Talbot's time, 222. Mich. 1736. Per Ld. Chancellor. The case of *Morrice v. the Bank of England & al*.

(B) In what Cases; and how.

1. **T**HE defendant was committed to the Fleet for not performing a decree, and the lands sequestered, and the plaintiff put in possession of the lands which were mortgage to him. It was insisted, that by the plaintiff's having the lands, and by the defendant's being in prison, there was a double execution; but it was ordered with assistance of judges, that the defendant should not be discharged till he has absolutely assured the lands to the plaintiff, or satisfied him his money and damages, and that the plaintiff hold the lands in the mean time. Chan. Rep. 152. 17 Car. 1. fol. 585. *Perryman v. Dinham*.

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2. A sequestration goes *not till suit revived against the heir*, unless the father's conveyance be pleaded. Cited by Lord Chancellor. 2 Chan. Cases, 46. as the case of the E. of Derby v. Ld. Ancram.

3. A sequestration to be laid on by the Court of Chancery ought always to be laid *conscionably*. Per Lord Chancellor. 2 Chan. Cases, 46. Hill. 32 & 33 Car. 2. in the case of *Colston v. Gardiner*.

4. Upon an affidavit, that the defendant David was gone into Holland to avoid the plaintiff's demand against him, and he having been arrested on an attachment, and a *cepi corpus* returned by the sheriff, the Court upon a motion granted a serjeant at arms against him, and upon the return thereof granted a sequestration. 1 Vern. 344. pl. 338. Mich. 1685. *Frederick v. David*.

5. The question was, whether the Court of Exchequer could grant a sequestration after a decree for a personal duty. It was admitted, that in process for appearance, a sequestration was always grantable by this court, but for a personal duty after a decree, there were many instances in my Ld. Ch. Baron Hale's time, and in the Ld. Mountague's time, where it had been denied; and and those precedents that had been produced for it, were most of them where it was the suit of the king, which was admitted on all hands, that where the king was plaintiff it might be granted. But by the opinion of Baron Jenner, Heath, and Powel, it ought to be granted; for they thought that if it might be granted in mesne process, where it did not appear whether there was any duty or not, a fortiori after a decree, where the duty was adjudged and ascertained.

certained. And it being always the practice of the Chancery ~~ought~~ much more in this court where the plaintiff was supposed to be a debtor to the king, and they thought that the jurisdiction of the Court of Equity would be to little purpose, if the Court had not sufficient authority to see their decrees executed. The Ld. Ch. Baron doubted, because the Ld. Ch. Baron Hale could never be prevailed upon to grant it, nor the Ld. Mountague, to whose learning he said he must greatly subscribe; but by the opinion of the other 3 it was granted. 2 Freem. Rep. 99. pl. 109. Trin. 1687. in Curia Canc. Guavers v. Fountain in Scacc.

But this matter being brought before the lords commissioners after the removal of Ld. Maclesfield it was observed that

this contempt was not sworn upon the Lady Gainshorough, whereas an *order for sequestration* is a judicial act of the Court, and therefore must be founded upon a proper affidavit, as he (Ld. Commissioner Gilbert) apprehended; and said that the order is the judgment of the Court and the sequestration is the execution, and the judgment ought not to be founded upon conjecture only; for if she be examined upon subsequent interrogatories, this will not make good the determination of the Court by a matter *ex post facto*. G. Equ. R. 178. Pasch. 8 Geo. 1. E. of Shaftsbury v. Shaftsbury.

6. A sequestration was ordered; unless cause, both against the Countess Dowager of Shaftsbury and the Countess of Gainshorough for a contempt in contriving and effecting the marriage of the Earl of Shaftsbury an infant, with consent of his guardian named by his father's will, and without applying to the Court, the matter of the said infant and guardian being then before the Court. 2 Wms's Rep. 110. Hill. 1722. Eyre v. the Countess of Shaftsbury.

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(C) Against what Persons.

The charge was of 200l. a year upon the manor of W. and there were 2 manors known by that name, the one of a greater and the other of a less value; and the

1. **A** BILL was brought against the defendant and the Countess of Suffolk for a rent-charge, which the defendant endeavoured to avoid the payment of, by pretending a prior right; and the matter being referred to the Lord Privy Seal and some other Lords of the Privy Counsel, their lordships at length declared, that if a decree should pass against the countess, and she not yield obedience thereunto, then all the lands insisted on by the plaintiff to be charged shall be subject to a sequestration for satisfying the said decree. Chan. Rep. 61. 64. 8 Car. 1. fol. 502. Harding v. Suffolk (Countess.)

plaintiff averred that the greater manor should be liable to the rent-charge, the other not being more than 60l. a year. Chan. Rep. 138. 15 Car. 1. S. C.

2. Sequestration was granted against an *infant lord* for not appearing, and the sequestrators received the rents. 2 Chan. Cases, 163. Trin. 36 Car. 2. Ld. Mohun's case.

3. If a *peer* of the realm appears, and does not answer, formerly an attachment lay, but now by order of parliament no process lies but a sequestration. Comb. 62. 29 Oct. 1687. in Chancery. Anon.

4. A sequestration nisi is the first process against a peer, or member of the House of Commons; but when it is granted against a peer

peer for want of an answer, it is good cause, against such order nisi, to shew that the answer is put in, which must be allowed, and when that answer is reported insufficient, the plaintiff must move again de novo for a sequestration nisi; per the Master of the Rolls; and Goldborough the register said it was the course of the court. 2 Wms's Rep. 385. Mich. 1726. *Ld. Clifford's case*.

(D) To what Places. Ireland, &c.

1. **C**HANCERY in England cannot award a sequestration *S. P. seems to be admitted. 2 Chan. Cases, 189. Mich. 2 Jac. 2. in the case of* against *lands in Ireland*. Arg. Vern. 76. Mich. 1682. in the case of the Earl of Arglais v. Muschamp.———And *S. P. seems to be admitted by the Lord-Keeper. Hill. 1682.* in S. C.

Ld. Kildare v. Sir Maurice Eustace.———Upon a motion for a sequestration of the defendant's estate in Ireland *for a contempt of this court*, the Master of the Rolls was of opinion, that such sequestration could not be granted, or at least that he would be well advised before he would grant it; for that the process of this court could not affect any lands in Ireland, the practice in such cases being to make affidavit, that the person standing in contempt is here in England, and being afterwards taken upon process, the Court will oblige him to give bail to abide and perform their decree. 9 Mod. 224. Hill 11 Geo. in Canc. *Sir John Fryer v. Vernon.*

2 Wms's Rep. 261. Arg. cites the case of Lord Arglais v. Muschamp, that the Court granted a sequestration into Ireland, and said that such process had been awarded to the Governor of *North Carolina*. But *Ld. Chan. Macclesfield* held that the plaintiff ought at least first to *take out sequestration here and upon nulla bona returned*, he said he would grant a sequestration which should affect the defendant's estate in Ireland, and that the court of justice here have a superintendent power over those in Ireland; but the Court doubted much whether *sequestration to the plantations abroad*, as *North Carolina, &c.* should not be directed by the king in council, where alone an appeal lies from the decrees in the plantations. 2 Wms's Rep. 261. Mich. 1724. *Sir John Fryer v. Bernard.*

N. B. In the said case of Fryer v. Bernard the Reporter makes a *quære to whom* the sequestration against the estate in Ireland is *to be directed*, and if it should not be by an order from the Lord Chancellor reciting the proceedings here, and directing the Chancellor of Ireland to [329] issue out a sequestration there. 2 Wms's Rep. 261. ut sup.

Select Cases in Canc. in *Ld. King's* time, 5 6. S. C. is, that a motion was made for a particular sequestration against the defendant's lands in Ireland, she having stood out the process of contempt here; and relied on the case of *HAMILTON AND POLLARD* in July and October last, where on like motion for a particular sequestration to *North Carolina*, the Chancellor said it might be right, but the method should be well considered, as it is to be a precedent, and inclined it should be to sequestrators. But the register on being asked, said, that sequestration never went. The Master of the Rolls said, that what led them into this motion was the case of the *EARL OF ARGLAIS V. MUSCHAMP*, where it was denied by the Court, but that afterwards application was made to the king, and a letter was sent to the Governor of Ireland, but never heard of any thing else of that sort, and it would be very odd, that the process of this court should have any thing to assist it. He said he remembered that a bill was brought into parliament, to extend judgments to the plantations, but it was rejected; but as to the plantations, it is particularly odd, as it *affects the king's sovereignty in council over them*; but what makes it clear to demonstration, that it should not go, is this, where a defendant to a bill, whose usual residence is in Ireland, happens to be here, he is obliged to give security; which makes it plain he is not amenable to this court; for if he was, that precaution would be unnecessary. So a particular *sequestration* was denied, but a *general* one of course granted.

(E) Of what Things.

1. **A**FTER the defendant was committed for non-performance of a decree, yet the Court ordered that a sequestration should be granted to levy monies of his in other men's hands, 18 Nov. Money decreed to be delivered to the plaintiff out of other

men's hands, 11 Jac. li. A. fol. 322. and he committed, because his wife would not bring in bonds after; but the chief order was in May 10. Jac. li. a. fol. 353. Toth. 273. Lakes v. Meares.
Toth. 233. cites 11 Car. Ladkin v. Sackville.

Chan. Cases, 185. S. C. but D. P.—
a Freem. Rep. 125. pl. 142. S. C. argued by Fountain in maintenance of sequestrations; and the Ld. Keeper hinted, that a court baron in a judgment of debt, did sequester the profits of the land by a judgment in debt, and therefore it is reasonable that the High Court of Chancery may do so; but Fountain would not defend the sequestration of choses in action, nor of copyhold estates, which was the point in question.

2 Upon a *decree for a personal duty*, a sequestration was awarded against the defendant's real and personal estate. It was afterwards moved, that sequestrations were sparingly granted formerly, and then only of the thing in demand, that they take more than all the executions at law, and had been extended so far of late as to *sequester things in action*. But on the other side it was insisted, that sequestrations were very ancient; and cited a case of *ZACHEVERELL V. ZACHEVERELL*, where a sequestration was awarded against both lands and goods; and the thing decreed was a personal duty, and that this sequestration was awarded by the Court, being assisted with the judges, upon view of 4 precedents. And urged, that if sequestrations were taken away, the justice of this court would be elusory; so that if defendant would lie in prison, the plaintiff, after great expence, could have no benefit of his decree. Lord Chancellor, assisted with Mr. Baron Turner, said they would see precedents; and after at another time declared they were satisfied the sequestration in the principal case was well awarded, and that sequestrations were *a necessary process of this court*. Chan. Cases, 91. Mich. 19 Car. 2. Hide v. Petit.

A sequestration was granted of lands for debts only, in 13 Jac. Lib. B. fol. 502. or thereabouts, and Mich. 14 Jac. Lib. 13. fol. 309. Toth. 274. Copland v. Mudd.—A sequestration for money was both of copyhold and freehold. Toth. 274. cites 13 Jac. Lib. A. fol. 105. Mullins v. Bawden.—A sequestration was for a marriage-portion. Toth. 275. says the decree was 15 or 17 Jac. Eardley v. Eltonhead. And see Toth. 273. 274. 275.—Sequestration may be of land and copyhold too, and may be extended for a personality; per Lord Chancellor. 2 Chan. Cases, 46. Hill. 32 & 33 Car. 2. in case of Collon v. Gardiner.

[330] 3. The defendant being in the Fleet, the money decreed was *sequestered*, it being *in the Fleet*. Chan. Cases, 92. cites it as in Toth. 166. S. C. 11 Car. the Lord Coventry's time. Russel v. Read.
and is, that a warrant was made to the serjeant at arms to go into the Fleet, and to take the defendant's money and goods to satisfy a fine.

4. Defendant being in contempt for *disobeying a decree*, and being a prisoner in Bristol, was brought thence by habeas corpus, and turned over to the Fleet, and refused to obey the said decree. The Court ordered a sequestration against his *real and personal estate*. 2 Chan. Rep. 151. 31 Car. 2. Elbard v. Warren.

S. C. cited Arz. Mich. 13 Geo. 2. Comyns's Rep. 714. in the case of Cook v. Cook in the Exchequer. 5. *Account of a personal estate was decreed, and referred to a master*; exceptions were taken to the account, and referred back on one exception; in the interim A. the defendant having had a treaty for the marriage of B. his son, but nothing concluded, he by deed, to enable B. to make a jointure, in case he married, and in consideration that B. had undertaken to pay his debts, amounting to 1700l. settled all his lands upon B. and his heirs, being of far greater value,

value, viz. many 1000 pounds, and the creditors were no parties to the deed; and in the deed a *power of revocation was reserved to A. in case B. should die without issue.* This was done before the master made his 2d report. The 2d report varied but 11l. from the former, being about 400l. due upon both reports: process of the Court was pursued to a sequestration against A. and his assigns. B. being taken upon attachment for disobeying the sequestration, and examined, excused himself by the title aforesaid. The question was, whether B. was liable to the sequestration in this case? which was much debated by counsel on B's behalf. 1st, Because no land was demanded but only on account of a personal estate. 2dly, Because at the time of the alienation the account was not ascertained, and the case of an outlawry was just the same; if the party aliened after the outlawry, his land was not subject to it in the hands of the alienee. And 3dly, The sequestration was for the contempt, and not for the duty. Lord Chancellor thought that the not allowing a sequestration, in case of a just duty decreed, makes this court illusory, and permits mankind to be cozened. And it being objected by Sir Francis Winnington, that his lordship had declared that a voluntary settlement would not bar a sequestration, he therefore desired leave to try it. But Lord Chancellor refused it, because he was of opinion that there is *fraud apparent*, and that there *needs no trial for satisfaction.* 2 Chan. Cases, 43. Hill. 32 & 33 Car. 2. Colston v. Gardner.

6. There was a decree for 5000l. on account against the father in execution, whercof the process was carried to a sequestration of the *lands which the father had at the time of the decree*, and settled on debate on the heir of the father, though he also made title thereto, by conveyance made to the father. It was disputed if the conveyance was revocable, or not; for if it was, the Lord Keeper would keep on the sequestration, though the decree was not for lands but for personal duty: at last the case appeared thus, the father about 1663, before the suit, settled the land voluntarily on himself for life, the remainder to his son, remainder over; provided he might by deed revoke those uses, and says nothing of limiting new uses; afterwards, and before the decree or bill, he revokes the former uses, and by the same deed limits an estate to his son; in which 2d deed was no power of revocation, but though it was voluntary and for natural affection, was absolute; so Lord Finch discharged the sequestration. Chan. Cases, 241. Anon.

a Chan. Cases, 46. S. C. cited (as the case of Witham v. Bland) in the case of Colston v. Gardiner. But where a sequestration was granted for a personal duty, and then defendant made a voluntary conveyance; this is no bar to the

sequestration cited by Lord Chancellor. 2 Chan. Cases, 46. in case of Colston v. Gardiner, as 17 May, 29 Car. 2. Langly v. Breddon.

7. Upon a contempt for not *answering plaintiff's bill*, the sequestrators were ordered to *pay the rents to the plaintiff*, towards the duty demanded by his bill. N. Ch. Rep. 1. Okeham v. Hall.

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8. If a *prebend* has a *sole distinct corpse*, it may be *sequestered*; but where he is only a member of the body aggregate, and the inheritance is in the dean and chapter, there cannot be a sequestration.

stration. 1 Salk. 320. Mosely v. Warburton a fellow of Winchester College.

9. On a decree for a personal duty, the defendant stood out in contempt, but before a sequestration against her, she being *tenant for life, infeoffed trustees*, in consideration of 5s. and also in consideration of 400l. part of a considerable sum recited to be due to her daughters; and so conveyed her estate for life, in trust for her daughters (infants) and their heirs. Afterwards a sequestration was taken out against the mother, and this estate was seised; it was referred to the deputy to examine what interest the mother and daughters had in the estate, who reported that they had not made out a sufficient title whereby to impeach the sequestration. It was insisted that this decree bound only the defendant's person, and not the land; and that the Master of the Rolls, in the case of Bligh & al. v. the Earl of Darnley, said that a decree for a debt does not bind the real estate, it acting only in personam, and not in rem, and the remedy to affect land is only by sequestration for a contempt, and that a decree for a debt never affects the lands in the hands of an heir. And several other cases there cited to the same purpose, but nothing mentioned as said by the Court any further in the principal case. Comyns's Rep. 712. pl. 277. Mich. 13 Geo. in the Exchequer. Cook v. Cook.

(F) Power of Sequestrators.

2 Chan.
Rep. 198.
32 Car. 2.
Ellard v.
Warren,
S. C. accordingly.

1. PART of the lands sequestered being a term for years, the Court afterwards ordered the commissioners of sequestration to *sell the term* towards satisfaction of the decree. 3 Ch. R. 87. Mich. 1681. Ellard v. Warren.

2. Sequestrators were in possession of a great house in St. James's Square, which was the defendant's for life; the Court ordered that the master allow a tenant for the house, and the sequestrators to *make a lease*, and the tenant to enjoy. 3 Ch. R. 87. Harvey v. Harvey.

2 Chan.
Cases, 104.
S. C. but
not S. P.—
2 Chan.
Rep. 245.
S. C. but
not S. P.—
3 Chan. Rep. 6. S. but not S. P.

3. Sequestrators, having, by virtue of an order, power to *fell timber*, they cut down to the value of 7000l. and paid over only 2000l. to the plaintiff, for whose benefit the sequestration was granted; North K. would not charge the plaintiff with more than the 2000l. though defendant was all the time an *infant*. Vern. R. 160. pl. 149. Pasch. 1683. Dacres v. Chute.

4. Sequestrators on *mesne process*, are *accountable* for all the profits, and can retain only so far as to satisfy for the contempts. Vern. 248. Trin. 1684. in the case of Gibson v. Scevington.

5. It was moved, that the *irregularity* of a sequestration might be referred to the deputy, which was taken out against the defendant

defendant for not appearing, by reason of it's being taken out sooner than by the course of the Court it could, and yet the sequestrators had taken the goods off the premises, and threatened to sell them. The Ch. Baron said, that as to * the carrying the goods off the premises, it was clear the sequestrators could do that, because a sequestration upon mesne process answers to a distringas at law; but however, as to the selling them, the Court agreed in the present case it could not be lawful, and said it had lately been settled upon debate; and observed farther, that courts of equity could not authorize sequestrators to sell goods, even upon a decree, till LORD STAMFORD'S ACT, which makes decrees in this respect equivalent to a judgment; and even now the counsel said, sequestrators cannot sell but upon leave of the Court: however, the Court said this was a matter proper for them to consider upon another occasion, and therefore only referred the irregularity of the sequestration, as to the point of time, to the deputy. Barnard. Rep. in B. R. 212. cites Mich. 3 Geo. 2. 1729. in the Exchequer. Desbrough v. Crumbey.

(G) Sequestration. Determined or set aside.

1. SEQUESTRATION discharged as to an annuity, after the death of the offender. Chan. Rep. 247. Proctor v. Reynell.

2. A decree being made against A. for a debt of 5457l. to J. S. a sequestration was awarded against the estate, but this defendant dying, and being only tenant for life, B. his son and heir being a creditor of his said father by statute staple, and judgment, for above 600l. due to B. long before J. S. had exhibited his bill, and B. being also seised as a purchaser in remainder of the same lands, and being now vested in him, and so his title prior to the bill of J. S. and against whom B. had brought his bill, and there being no reason to charge the lands with the debts of A. it was decreed that the sequestration, and all orders and proceedings thereon, be absolutely set aside and discharged. Fin. Rep. 126. Mich. 26 Car. 2. Witham v. Bland.

S. C. cited by Lord Chancellor. 2 Chan. Cases, 46. Hill. 32 & 33 Car. 2. in case of Colston v. Gardiner.

3. A sequestration was granted for not obeying a decree, and the plaintiff was in possession, but the decree was reversed because not well grounded; and therefore decreed the sequestration to be set aside. Fin. Rep. 312. Trin. 29 Car. 2. Puleston v. Puleston.

4. On a demurrer the plaintiff's bill was to revive a sequestration obtained against the defendant's husband for a personal duty before his intermarriage with the defendant, and to avoid the defendant's estate in dower in the lands that were sequestered before the marriage, it being insisted, that these lands were so bound by the sequestration, and covered therewith, that the defendant's right of dower could never attach them. To this bill the defendant demurred, and the demurrer was allowed by the Lord Keeper; and the counsel at the bar desired to know his lordship's opinion, whether the heir in fee simple should, in such case, have the

But: Vernon 166. pl. 157. Palch. 1683. upon a demurrer, the Lord Keeper inclined, that a sequestration for a personal duty determined with the death of

the party,
and could
not be re-
vived
against the
heir; but

the estate bound, and subject to such a sequestration, or not? But the Lord Keeper refused to declare his opinion therein; saying, that case was not now before him. 1 Vern. 118, 119. pl. 106. Hill. 1682. Anon.

took time to consider of it, and would be attended with precedents; and the case of Rockley and Burdet was cited, where it was ruled, that such a sequestration should not bind the feme, who came in for her jointure or dower. University College v. Foxcroft. — 2 Chan. Rep. 244. S. C. accordingly, though it was insisted, that it was a case of extremity, being on the behalf of a charity, and that the defendant endeavours to deprive the plaintiffs of 2000l. given to purchase 100l. a year for maintenance of 8 fellows of the college.

A sequestration which issues *as mesne process* will be discontinued, and *determines* by the death of the party; but where it issues *in pursuance of a decree*, and to compel the execution of it, there, though it be for a personal duty, it is otherwise. Vern. 58. pl. 54. Trin. 1682. Burdett v. Rockey.

[333] 5. At the setting down of the Exchequer-causes in Serjeant's-Inn, an *ejectment* having been brought *of lands which sequestrators had got possession of*, a bill was brought to revive the sequestration, and likewise an injunction prayed to stay proceedings in the ejectment. Counsel moved, that the sequestration might be revived. He allowed, that it was taken *partly upon copyhold lands and partly upon freehold*, and that the *defendant in the original suit was dead*; but yet he submitted it, that the sequestration was proper to be revived, as to the whole lands in the hands of the heir: he confessed, that this was a sequestration on a decree, and that such sequestrations were but of late date. They began in the time of Ed. Nottingham in the Court of Chancery, and not allowed in this court till the 14th of June 1687, in the case of FOUNTAIN and MAVERS. He confessed likewise, that they did abate by the death of the party; but yet, he said, as to the freehold, it was certain it might be revived; and as to the copyhold he submitted it, the law was the same; for it is well known, that this process runs upon these lands, though the common law process of *elegit* does not. The Court said, that though it was true *sequestrations run upon copyhold*, yet it was to be doubted whether it could be *revived* in the hands of the heir to such lands; for if it should the heir would not take up those lands, and then the lord would be without a tenant; for which reason they ordered the injunction to continue only as to the freehold lands, and dissolved it as to the copyhold, with liberty to apply to the Court again. Barnard. Rep. in B. R. 431. Hill. 4 Geo. 2. 1730. Whitehead v. Harrison.

(H) Relation.

1. **W**HERE the defendant, for not bringing into court a deed pursuant to a decree, was prosecuted on contempt to a sequestration, which he got *set aside on a false suggestion*, a writ of *restitution* was decreed to the plaintiff and defendant to account to him for what he had received since he got the sequestration set aside. Fin. Rep. 471. Mich. 32 Car. 2. Lewis v. Lewis.

2. The

2. The sequestration *binds from the time* of awarding the commission, and not only from the time of executing it, and its being laid on by the commissioners; for if that should be admitted, then the inferior officer would have *ligandi & non ligandi potestatem*. Vern. 58. pl. 54. Trin. 1682. *Burdett v. Rockey*.

For more of Sequestration in general, see Serjeant at Arms, and other proper Titles.

Serjeant at Arms.

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1. **T**HIS officer, serjeant at arms *is by patent from the queen for life*. P. R. C. 332.

2. *His office is* to bear a gilt mace before the Ld. Keeper, in going to or returning from court or parliament; and to execute all warrants granted against any person after he has stood out a commission of rebellion; or to bring up, by order of Court, any one that is in custody of a sheriff or other officer, who has returned a *cepi corpus* upon a process of this Court, and brings not in the party, and to take into custody any other person, upon an order of this Court. P. R. C. 332.

3. It was said, the Court may, if there be cause, send this officer *to bring in a defendant to appear, instead of issuing a subpœna*. P. R. C. 332.

4. He has *several deputies*, some of whom are used as, and called *messengers* (as is said) before a commission of rebellion; *others* upon or after a commission of rebellion, and are *called by the name of their superior*. P. R. C. 332.

5. A party in custody of the serjeant at arms or messenger, upon some contempt, prayed to be turned over to the warden of the Fleet; because he lay in the hands of the officer at so great an *expense* as 13s. 4d. *per diem*; and it was granted him. P. R. C. 332.

6. Where a *defendant is taken upon process of contempt*, and the sheriff returns *cepi corpus*, the party lying in prison, or the *sheriff refusing to bring him in*, the Court will order a messenger (if desired) to take the prisoner into his custody and bring him in. P. R. C. 333.

7. The Court refused to order a messenger *to Durham*, which is 200 miles or more, on the return of a *cepi* on an attachment, because

because of the great distance and expence; but said, it is used to be granted as far as York. P. R. C. 333.

8. Upon an information, that A. & B. two *necessary witnesses*, *absented themselves*, so as not to be found to be served with process, a messenger was granted to bring them in. P. R. C. 333.

Per Ld. K. North, since the granting a messenger in such case is become

the ordinary process of the court, and it might be necessary for *expedition*, yet he must take care that the king might not lose his *amerciements*; and therefore, for the future, no messenger should go till the sheriff be amerced. But it was answered, that would occasion great delay; for that the sheriff could not be amerced but in term-time. Vern. 154. Pasch. 1683. Anon.

Note, when a *cepi corpus* is once returned, there is an end of all manner of process, (for no proclamation or commission of rebellion goes after that) and though a messenger of late years has been usually granted in such cases, yet he is but a new officer, and subordinate to the serjeant at arms; but regularly, in such a case, you ought to move, the defendant may enter his appearance and be examined within 4 days, or stand committed. 1 Vern. 344. pl. 338. Mich. 1685. Frederick v. David.

On a like motion and suggestion, that the sheriffs of London have the *amerciements*; and therefore it being a vain thing to amerce, the usual way in such cases is for a messenger. Ld. Chan. King said, that the *sheriff* having returned, *that he had the body in his custody*, the best way is to move, that he bring in the body; which, if not done forthwith, he said, he would order the *sheriff* to pay the plaintiff's costs; and that by introducing this practice into the Common Pleas, he had prevented this * dilatory there; and therefore, in order to prevent the like delay in this court, his lordship directed an order upon the sheriff, that he forthwith bring in the body. 2 Wm's Rep. 301. Trin. 1725. Anon.

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G. Equ. R. 84. Hill. 8 Ann. S.C.

10. A messenger shall go in all cases where the sheriff takes bail where the party is notailable, as upon an attachment for not paying costs; and so it was ordered. Ch. Prec. 331. Pasch. 1712. Anon.

11. No *sequestration* can regularly issue to sequester the estate of any person who cannot be found, but upon the return of *non est inventus* of the serjeant at arms; per Ld. Chancellor: and his lordship did therefore order, that from henceforth where any person is in contempt, either for want of an appearance or answer, or for not yielding obedience to any order of this court, (unless it be for contemptuous language, or the beating and abusing any person in the serving the process of this Court, or other contempts of the like nature) the serjeant at arms attending this court do apprehend and bring the contemner to the bar of this court, to answer such contempt; but if the contemner can not be found, then to return, *non est inventus*; to the end a sequestration may regularly issue, according to the ancient rules and practice of this court; and that process do, for the future, issue accordingly; and that it may be made a part of all orders for giving time to answer, or for doing any other act upon the party's entering his appearance with the register, that the party, when he enters such appearance, do likewise consent that a serjeant at arms do go against him, as upon a commission of rebellion, returned, *non est inventus*, in case of non-compliance; and that this order be hung up in the registers and Six-Clerks Office of this court, that all persons may take notice thereof, and yield obedience

obedience to the same. Chan. Prec. 553, 554. pl. 341. Mich. 1720. Ex parte Jephson Serjeant at Arms.

12. The return of the 2 attachments, upon which an *order for a serjeant at arms* was grounded, was reported to be *irregular* for *not being entered in the Register's Office*. 2 Wins's Rep. (657.) Mich. 1731. James v. Philips.

For more of Serjeant at Arms in general, see Sequestration and other proper Titles.

Service of Rules, Orders, &c.

1. **A** BEING served without a copy of an *injunction*, desired the person to shew him the writ to *examine the writ and copy*, to see how far he was concerned in it, which was denied; whereupon A. delivered back the copy, and disturbed the possession which the injunction was to quiet. Per Lord Keeper, the party below shall obey; if he will dispute, he shall do it here. 2 Chan. Cases, 203. Mich. 26 Car. 2. Woodward v. King.

2. A *plaintiff is a good witness* to prove service of a decree; [336] but if the defendant swears the clean contrary, he shall be discharged of the *contempt*. 3 Chan. Rep. 39. Mich. 1659. Nurse v. Guillim.

3. Two defendants had brought a joint action at Leghorn against the plaintiff, and had there arrested his goods, and the defendant (Baker) being now here, and the other *at Leghorn*, and a bill being filed against them, Baker put in his answer; and it was ordered, that a *subpœna* being left with him should be good service on the other defendant, who was at Leghorn; and thereupon an *attachment for want of an answer*, and so an injunction to stay proceedings at Leghorn: but the Ld. Chancellor said, he would advise with the judges; which afterwards he said he had done, and their opinion was, that the injunction ought to be dissolved: but the Reporter says, that all the bar was of another opinion; and that it was said, that an injunction did not lie for foreign jurisdictions, nor out of the king's dominions; but to that it was answered, that the injunction was not to the Court but to the party. Chan. Cases, 67. Pasch. 17 Car. 2. Love v. Baker & al'.

4. *Subpœna* was served on the defendant's servant, who gave no notice to the defendant, who was prosecuted for contempt to a serjeant at

at arms. Per Cur. though the want of notice is sufficient to discharge the contempt, yet the defendant shall pay the plaintiff's *costs*, else the plaintiff may be put to charge without any fault of his; for *prima facie* the service was good, and ground enough for the plaintiff to go on with process of contempt; and so shall have his costs. Hard. 405. pl. 6. Pasch. 17 Car. 2. in the Exchequer. Duncomb v. Hide.

5. If a man be *within and keeps his doors shut*, the *leaving a rule at the house* is good service; otherwise if he is from home. Comb. 243. 5 W. & M. B. R. Anon.

6. Lord Sommers doubted if a *foreigner* can be served with a subpoena *in a foreign country*; and Hutchins said, he remembered that the great Duke of Tuscany had laid several persons by the heels for executing a commission to examine witnesses in his dominions without his leave. Ch. Prec. 83. Mich. 1698. Cowslad v. Cely.

7. If the party's *clerk in court be dead*, no process can be taken out against the party, till he has appointed a new clerk in court, and a subpoena *ad faciend. attorn.* must be taken out and served; for till then the party is not in court. And it was allowed, that the service of such subpoena would be good, if *left at the house*. Wms's Rep. 420. Pasch. 1718. in the case of Roper v. Ratcliff.

For more of Service of Rules, &c. in general, see Injunctions and other proper Titles.

(A) What shall be said a Sessions.

The parliament of 14 E. 3. began at Westminster the Wednesday after Mid-

[1. **T**HE passing of any bill or bills, by giving the royal assent thereunto, or the giving any judgment in parliament, does not make a session, but the *session does continue until* that session be *prorogued or dissolved*; and this is evident by many precedents in parliament, ancient and late. 4 Inst. 27.

Lent: the 1st Monday of the parliament, the 9th part of their grain, wool, and lamb, &c. was granted to the king, on condition that the king would grant their petitions in a schedule, beginning thus, viz. these be the petitions which by the commons and lords were drawn into a form of a statute, and passed both houses, and the royal assent thereunto, and the same exemplified under the great seal. After this the parliament continued, and divers acts made, and petitions granted; and in the end that parliament was dissolved. 4 Inst. 27.

In the parliament holden anno 9 R. 2. it is declared by act of parliament, That the killing of John, imperial ambassador of Genoa, was high treason, *crimen laesæ majestatis*, and yet the parlia-

ment continued, long after, and divers acts of parliament afterwards made, and petitions granted: and in the end the parliament was dissolved. 4 Inst. 27.

In the parliament, begun the 1st day of March, anno 7 H. 4. on Saturday the 8th day of May it was enacted by the king, the lords spiritual and temporal, and the commons, that certain strangers by name, who seemed to be officers to the queen, should by a day depart the realm, and proclamation thereof in kind made by writ, by authority of parliament; which parliament continued, and divers other acts of parliament made, and petitions answered, and on the 22d day of Dec. 8 H. 4. dissolved. 4 Inst. 27.

The parliament begun the 7th of November; and on the 1st day of the parliament it was resolved, by all the judges, that those that were attainted of treason, and returned knights, citizens, or burgesses of parliament, that the attainders were to be reversed by authority of parliament before they could sit in the House of Commons; and that after the attainders reversed, both the lords and those of the House of Commons might take their places; for such as were attainted could not be lawful judges so long as their attainders stood in force; and thereupon the attainders were reversed by act of parliament, and then they took their places in parliament; and the parliament continued, and divers acts made. 4 Inst. 27.

The bill of Queen Katherine Howard's Attainder passed both houses about the beginning of the parliament, whereunto the king sitting the parliament by his letters patents gave his royal assent, and yet the parliament continued until the 1st day of April, and divers acts of parliament passed after the said royal assent given. Divers more might be produced but these shall suffice. So as albeit bills passed both houses, and the royal assent given thereunto, there is no session until a prorogation or a dissolution. 4 Inst. 27.

The Earl of Shafsbury, with other lords, was committed to the Tower in 1676. by virtue of an order of the House of Lords. It was insisted by the counsel for the earl, that by the king's giving his royal assent to several laws which have been enacted, the session is determined, and then the order for the imprisonment is also determined; and cited Brook, tit. parliament 36. every session in which the king signs bills is a day of itself and a session of itself. 1 Car. 1. cap. 7. a special act is made, that the giving of the royal assent to several bills shall not determine the session. It is true, it is there said to be made for avoiding all doubts. In the statute of 16 Car. 1. cap. 1. there is a proviso to the same purpose; and also 12 Car. 2. cap. 1. 11 R. 2. That by the opinion of Coke. 4 Inst. 27. the royal assent does not determine a session, but the authorities on which he relies do not warrant his opinion; for 1st, in the parliament roll. 1 H. 7. 6. it appears, that the royal assent was given to the act for the reversal of the attainder of the members of parliament, the same day that it was given to the other bills; and in the same year the same parliament assembled again, and then it is probable the members, who had been attainted, were present, and not before, that 8 R. 2. n. 13. is only a judgment in case of treason, by virtue of a power reserved to them on the statute 25 Edw. 3. Roll. Parliament 7 H. 4. n. 29. and is not an act of parliament. 14 E. 8. n. 7, 8, 9. the aid is first entered on the roll, but upon condition that the king will grant their other petitions. The inference my Ld. Coke makes, that the act for the attainder of Queen Catharine 33 H. 8. was passed before the determination of the session, is an error; for though she was executed during the session, yet it was on a judgment given against the queen by the commissioners of oyer and terminer, and the subsequent act was only an act of confirmation. Arg. 1 Mod. 151. pl. 1. Trin. 29 Car. 2. B. R. in case of the Earl of Shafsbury.

2. The diversity between a prorogation and an adjournment [338] or continuance of the parliament, is, that *by the prorogation in open court* there is a session, and then such bills as passed in either house, or by both houses, and had no royal assent to them, must at the next assembly begin again, &c. for *every several session* of parliament is in law a *several parliament*; but if it be *but adjourned or continued*, then is there no session; and consequently all things continue still in the same state they were in before the adjournment or continuance. 4 Inst. 27.

3. When a parliament is called and sits, and is dissolved without any act of parliament passed, or judgment given, it is no session of parliament, but a convention. 4 Inst. 28.

A writ of error was brought in parliament to reverse a

judgment in assise, but the parliament being dissolved, it was moved for execution according to the former judgment. Coke Ch. J. held, that this was no parliament; because no bill passed, nor was any royal assent given, so that it was only an inception of a parliament; but if any assent or dissent had been to any bill, then it should have been said to be a session; and then a roll should have been made thereof, and it is not to be tried by a jury, whether there was a parliament or not. And execution was granted by rule of court. 2 Bull. 237. Trin. 12 Jac. Heydon v. Goddard.

A summons was awarded for a parliament, and the knights and burgesses were returned, and the lords and king came in state to the parliament, and some bills passed both houses, and some patents, by command of the Commons, were brought in, because they apprehended them to be against law, after the last day of the last term the king by commission dissolved the parliament. And there Coke said, that he had seen divers precedents where the king had annihilated such parliament, as 12 E. 4. the parliament was revoked (as the word is) and supersedeas granted to the counties and towns, by reason of a sudden coming of enemies, and that the like was done in the time * of E. 2. by proclamation and supersedeas. But Roll (the Reporter) adds a note, that he had been credibly informed, that by the opinion of all or the greater part of the justices, the statutes aforesaid are not determined for the cause aforesaid: and says, quære if the precedents aforesaid are that the parliament was dissolved, in as much as it is said the supersedeas's were awarded to the counties and towns, which implies, that it was after summons and before assembly. Roll. Rep. 29. pl. 1. Trin. 22 Jac. Anon.

* a Bull. 237. cites the S. P. and says it was upon the coming in of the Scots, but that all the bills did then stand in their force to be revived again at the next sessions of parliament.

4. It was agreed, that *every parliament is a session*, but not *e converso*; for one parliament may have several sessions. Hutt. 61. Hill. Vacation, 20 Jac.

Lev. 265. 5. An *act* of parliament was made *to continue for 3 years, and*
 Man v. from *thence to the end of the next session* of parliament, *and no longer*.
 Cooper, S.P. accord- Resolved that this must be intended a session which commences
 ingly, and after the 3 years expired; for if a session should be within the
 seems to be three years, and continue for many years, the act would continue.
 6. C. And Vent. 22. Pasch. 21 Car. 2. B. R. Anon.
 the Re-
 porter says

that so it was resolved in C. B. the same term, as Lockhart the prothonotary informed him.—
 And where in such case there had been a convention of parliament after the 3 years, but no act
 passed in it but the parliament was prorogued, it was held that this was no session of parliament,
 and therefore the act continued; and Twissden J. said the opinion of Hale Ch. B. was accordingly.
 Sid. 467. pl. 28. Pasch. 22 Car. 2. B. R. Horsley v. Potts.

Hob. 78. 6. It cannot be *called* a session of parliament, unless the *king*
 pl. 102. *pass an act*. Vent. 22. Pasch. 21 Car. 2. B. R. Anon.
 Id. 111.
 pl. 122.

For more of Sessions of Parliament in general, see Parliament, Statutes, and other proper Titles.

(A) Summoned and held; how, and by whom.

2 Hawk.
 Pl. C. 405.
 cap. 41. S. 1.
 takes notice

1. **T**HOUGH sessions of justices of peace be commonly and
 most orderly summoned by a *precept in writing*, yet it is

not

* *not altogether of necessity* (for the making of a lawful sessions) to have it so; for if competent justices of the peace do get men to serve, and thereupon do hold a session (without any precept before directed) all presentments made before them by 12 lawful men, shall be of force in law; but no man shall lose any thing for his default of appearance there, because no man had notice of their sitting. Lamb. Eiren. lib. 4. cap. 2.

that it is said that a jury may be returned before justices of peace at their sessions by a bare award,

because the precept for the summons of the sessions hath a clause to the same effect, for the summons of 24 out of every hundred, &c. Yet he much questions whether this matter do not rather depend on practice, and the constant course of precedents, than any argument from the reason of the thing; for the precept to the sheriff from justices of oyer and terminer, in order for the holding of their sessions, has, in effect, the very same clause for the bringing of 24 before them out of each hundred at the day of their sessions, &c. And yet it seems agreed, that they cannot have a jury returned for the trial of an issue joined before them, by force of a bare award, but ought to make a particular precept to the sheriff for that purpose under their seals.

* S. P. Arg. Ld. Raym. 2 Rep. 1237. Hill. 4 Ann. in the case of the Queen v. the Bailiffs &c. of Gippo [Ipswich.]

2. This precept may be made by any 2 justices of the peace, so that the one of them be of the quorum; for 2 such may hold a session of the peace, as it does plainly appear by the commission; and therefore, (as Mr. Marrow says) it suffices, not to have it run under the name of the *custos rotulorum* alone, seeing that he has no more authority in this behalf, than any one of his fellows has; for the words of the said mandamus in the commission to the sheriff be coram nobis, &c. Venire facias tot. & tales, &c. yea, * if 2 such justices make a precept for a session of the peace, all their fellow justices cannot discharge it by their superseatas; but a superseatas out of the Chancery will discharge it, says Fitzh. Lamb. Eiren. Lib. 4. cap. 2.

Serjeant Hawkins says, it seems clear from the express words of the commission, that any 2 such justices, whereof one is of the quorum, may hold such court at

such days and places as shall be appointed by them, and that the sheriff is bound to return proper juries, and that the *custos rotulorum* ought to bring the rolls of the place before them, &c. 2 Hawk. Pl. C. 41. cap. 8. S. 41.

And from hence it seems to follow, that any 2 such justices may direct their precept under their teste to the sheriff for the summons of the sessions of the peace, thereby commanding him to return a grand jury before them, or their fellow justices at a certain day and place, and to give notice to all stewards, constables, and bailiffs of liberties, to be present and do their duties at such day and place, and to proclaim in proper places throughout his bailiwick, that such sessions will be holden at such day and place, and to attend there himself to his duty, &c. 2 Hawk. Pl. C. 41. cap. 8. S. 42.

* S. P. 2 Hawk. Pl. C. 41. cap. 8. S. 43.

3. And if one justice of the peace alone will take upon him to hold a session of the peace (that was lawfully summoned by him and another such justice) and will make the stile of the session in the names of himself and the other, all presentments so taken before him may be avoided; but if the sessions be in truth holden by 2 sufficient justices only, and the stile (or title) thereof be made in the names of 3, then all the presentments before them shall stand good; for it will not help the party to say, that one of the 3 was not there, when it shall appear that 2 of them (the one being of the quorum) were present, which will suffice. Lamb. Eiren. Lib. 4. cap. 2. cites Marrow. [340]

(B) Holden when, and how often.

See Lamb.
Just. Lib. 4.
cap. 19. the
comment
upon this
statute.

1. 2 H. 5. 4. **E**NACTS, that *the justices of peace shall hold their sessions 4. times a year, viz. in the first week after Michaelmas, the first week after Epiphany, the first week after Easter, and the first week after the translation of St. Thomas a Becket, and oftner if need be.*

2. 14 H. 6. 4. Enacts, that *justices of the peace in the county of Middlesex shall not be obliged to hold their sessions above twice in the year, notwithstanding the statute of 12 R. 2. yet they may keep them oftener, if need be, at their discretions.*

(C) Holden. In what Place.

1. **I**T was enacted by a *private act of parliament 5 E. 6.* That the quarter-sessions for the county of *Anglesea* shall be holden at *Beaumorris* in that county, and not elsewhere. This act was exemplified and shewed to the justices under their great seal, at their sessions, but yet they proceeded, and took several indictments of felony at *B.* another place within that county; adjudged by all the judges, that the said indictments were void by reason of the negative words, (and not elsewhere) and the justices were fined in the Star-Chamber for their contempt: Jenk. 212. pl. 49. cites 3 Mar. D. 135.

It is arbitrary, and at their own pleasure, so that it be

2. The justices of peace may hold their quarter-sessions, *where they think fit in the county, if they be not restrained as above.* Jenk. 212. pl. 49. cites 33 H. 8. 50.

meet for access. And though the precept appoints the sessions to be holden in some one town by name, yet may the justices keep it any other town, and all the presentments shall be good that shall be taken where they hold it; but then again no amercement can be set upon any man for his default of appearance there, because he had no warning of it. Lamb. Eiren Lib. 4. cap. 2. cites Marrow.

[341] (D) Of Appeals to Sessions: and good or not.

Poor's Settlements,
248. pl. 286.
cites S. C.

1. **T**HE party removed by order of 2 justices may appeal to the sessions as well as the parish. Per tot. Cur. Carth. 222. Pasch. 4 W. & M. The King v. Hartfield.

2. Two justices of peace, by an order, send certain poor persons the 29th of June 1712. to the parish of *Hunston*; two justices there the 24th of July send them back to *Malendine*; then the officers of *Malendine* appeal to the sessions, and that is confirmed. Now these 3 orders are removed by certiorari, and the Court quashed the order of the 24th of July, because they ought to have appealed, and not send them back; and held the order of the first 2 justices to be good, because there was no appeal against it.

Foley's

Foley's Poor Laws, 273, 274. Hill. 12 Ann. B. R. The Parishes of Malendine v. Hunsdon.

3. An appeal from an order of 2 justices in relation to *bastardy* is not properly an appeal, but a defeasance of the recognizance; for the recognizance is to appear at the sessions, and to abide by their order, and if they make none then to abide by the former order. Per Parker Ch. J. Poor's Settlements, 74. pl. 97. Trin. 1716. Anon.

4. An exception was taken to an appeal to the sessions, that it did not appear that it was made by any one of the parishes concerned, without which they have no jurisdiction; sed non allocatur; for it is here said upon an appeal, though not mentioned by whom, yet if held to strict law, it must appear to be by the churchwardens and overseers; but it is said, it was an appeal made from an order by 2 justices, and it is not to be conceived that strangers would trouble themselves. It is a rule as to all inferior courts, that it must appear they had jurisdiction, but that which governs us, is the many precedents, and *all the orders in this riding of Yorkshire being as this* is we must allow it though in some sort defective. There is some little difference between this case, and a complaint made to 2 justices. MS. Cases. Trin. 4 Geo. The King v. the Inhabitants of Aldermanbury and Haddersfield in the West-Riding of Yorkshire.

5. 9 Geo. 1. cap. 7. S. 8. Enacts, that *no appeal from any order of removal shall be proceeded upon unless notice be given by the churchwardens or overseers of the parish who shall make the appeal to the churchwardens, &c. of the parish from which such poor person shall be removed*, the reasonableness of which notice shall be determined by the quarter-sessions; and if reasonable notice be not given, they shall adjourn the appeal to the next quarter-sessions.

6. There was an order of 2 justices to remove a poor person from Cawood parish to Uleskelf. Upon the order of appeal it appeared, that the appeal was by the inhabitants of Uleskelf (with a double ll) so it was objected that it was not the same parish. Adjournatur. At another time it was insisted to be the same; and that it had been often held where there was so small a difference as this is, yet being of the same sound, it was held well, and cited several books to that purpose. Afterwards the whole Court were of opinion that Uleskelf and Uleskelf were the same. The same rule holds where there is some small difference between the certiorari and the orders returned, if the words continue the same in sound. Foley's Poor Laws, 281, 282. Trin. 2 G. 2. in B. R. The King v. the Inhabitants of the Parish of Cawood.

(E) Appeals. To what Sessions it must be. [342]

1. 8 & 9 W. 3. cap. 30. S. 6. ENACTS that the appeal against any order for removal of any poor person shall be determined at the quarter-sessions for the county, division, or

or riding wherein the place, from whence such person shall be removed, doth lie.

Comb. 448.
Browne's
case, S. C.
Holt Ch. J.
said, that
the appeal
ought to be
to the next
sessions;
but it being
said that he
had no no-
tice till after
next ses-
sions, Holt
inclined,
that the ap-
peal might

2. An order adjudged B. to be the father of a bastard child, May 2, 1696. And in the Mich. sessions following the said order was discharged: now both orders being here, the latter was quashed, because it did [not] appear thereupon, that Mich. sessions was the first sessions after notice given to the reputed father, of his being so adjudged; for though 18 Eliz. appoints the appeal not to be to the first sessions after the order of the 2 justices, but the first sessions after the party has notice of the said order; yet by the statute of H. 5. there might be a sessions intervening, as in this case, between the order by the 2 justices, and the order of sessions; and it must appear on the order that this was the first sessions after notice had of the former order. 2 Salk. 480. pl. 29. Trin. 9 W. 3. B. R. The King v. Brown.

lie to the next sessions after notice. Wheresoever it does appear there might be an intervening session by law, it lies upon the party to prove that he had not notice till after the next session; nay, it seems it should appear so in the order of session.

In such a case the party appealed to the next quarter-sessions of peace after notice, where the order of the 2 justices was discharged: and now it was here moved to quash the order of sessions; because by the statute the appeal must be to the next general sessions, and there might have been a general sessions before the general quarter-sessions, as in London and Middlesex, where there are 4 general sessions in a year besides the general quarter-sessions. Quashed for this fault. 2 Salk. 482. pl. 34. Trin. 10 W. 3. B. R. The King v. Shaw.——Carth. 455. by name of Shaw's case.——Poor's Settlements, 135. pl. 180. and 141. pl. 185. cites S. C.——12 Mod. 203. S. C.

3. Two justices of St. Alban's made an order, that *whereas they were credibly informed, that Wendover was the place of H's last legal settlement; but no where adjudged it to be so.* From this order there was an appeal to the quarter-sessions of St. Albans, where it was confirmed; and both were quashed: the first, because there was *no adjudication* of what was the place of his last legal settlement; and the 2d because the *appeal ought to have been to the sessions of the county*, * not of the corporation; and as it was, it was coram non iudice. Salk. 490. pl. 54. Pasch. 13 W. 3. B. R. Watford Inhabitants v. Wendover Inhabitants.

* S. P. For
then there
would be
an appeal
ab eodem ad

eundem; there being, it may be, the same justices sitting who made the order. Poor's Settlements, 6. pl. 10. Mich. 12 Ann. B. R. The Parish of Maldon in Essex.

4. The inhabitants of the parish of St. Giles appealed to the sessions upon an order made for the levying a poor's rate, in which some were unequally taxed; upon which the sessions dismissed the appeal, and shew for cause in the order of dismissal, that the Court being of opinion that the appeal should have been to the next quarter-sessions after making the rate, and not after the taking the distress *ideo the Court does dismiss the appeal.* And this order being removed into B. R. by certiorari, it was insisted for confirming the order, that though 43 Eliz. does not say that the order shall be to the next quarter-sessions, yet it is necessary so to be; for else it will create confusion, no time being limited by the act; for if not the first, it cannot be brought in any certain time: that this is not an appeal for relief, but to quash the rate which should be before any payment

payment upon it, or distress for it; for if the rate is not good, an action lies against the overseers for taking the distress. It was answered, that it is not necessary the appeal should be to the next quarter-sessions; for there is *no time limited by the act*, and that being alleged for the reason of the order of dismissal, it is bad; besides, this appeal was at the next quarter-sessions *after the grievance*. Per Cur. this appeal need not be to the next quarter-sessions; but the error of the *justices* is, that they did not proceed upon it when it was before them, and give judgment whether the rate was good, or not. Though one of the parties may have a *particular appeal*, yet this being a rate which they think not according to the act, they may *appeal together*. But it being assigned for a reason, that the appeal was not to the next quarter-sessions, the Court quashed the order of dismissal. 11 Mod. 259. Mich. 8 Ann. B. R. The Queen v. St. Giles's Parish.

5. A person was *removed* from M. to St. John's, by an order bearing date 12th February, and they *appealed to Trinity sessions*. It was moved to quash the order, there appearing to be an intervening sessions, and so not within the act of parliament. And per Parker and Cur. you cannot take this objection now; it is matter of fact, and perhaps the *order was not served till after the sessions*: you should have made this objection then, it is too late to make it now. The order was not quashed. Poor's Settlements, 66. pl. 88. Milbrook v. St. John's in Southampton.

S. P. Per Parker Ch., J. Poor's Settlements 36. pl. 63. Pasch. 1712. The QUEEN v. CRIPPS. And he cited a case which he moved

when counsel, the parish of RUCBY in Leicestershire; the order was made 9th July; the party appealed the next Michaelmas sessions, so that a sessions intervened, but over-ruled; and if the objection had any weight it would have prevailed then.——It was resolved, that it is *not necessary to appear on the face of the order of appeal, that the appeal was at the next sessions after service*; for the Court will intend it to be so, this being matter to be taken advantage of below at the sessions; and if it be not, the parties have lost their opportunity. Trin. 16 G. 2. B. R. Parishes of Northbrady v. Rhode.

(F) Their Power.

1. **T**HE Court of Justice of Peace is no more base than this court; for the justices of peace have power to enter pleas of the crown, scil. of felony, as well as those of B. R. Br. Failer de Record, pl. 3. cites 4 H. 6. 23. Per Rolfe.

2. The justices of the peace be so necessary, as without them (though all others should appear) no session can be kept; and yet if any of them be absent, their fellow justices * cannot amerce them; as the justices of assize may do for their absence at the gaol-delivery; for *inter pares non est potestas*, and the *authority of all* the justices of the peace at the sessions, is *equal*; so that like power has he which is not of the quorum with him that is, *except* it be *in special cases set forth in the commission and statutes*; and therefore it was holden (3 H. 7. Fitzh. Tit. Justice del Peace 3.) that if one which is not of the quorum, will be so bold as to rebuke one that is of the quorum, he and his companion: may not commit him to prison for it. Lamb. Eiren. lib. 4. cap. 3.

* Serjeant Hawkins says, this seems certain, it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other judges in a superior station, than to those in the same rank with themselves: and yet he says

to other judges in a superior station, than to those in the same rank with themselves: and yet he

says, it seems agreed, that if a justice of peace gives just cause to any person to demand the surety of the peace against him, he may be compelled by any other justice to find such security; for the publick peace requires an immediate remedy in all such cases. 2 Hawk. Pl. C. 41. cap. 8. S. 46.

[344] (G) Their Power. *As to Orders made by Justices.*
See Baf-
tardy.

S. C. cited
2 Bulst. 342.
Mich. 6 Car.
B. R. in the
case of the
King v.
Smith, and
there said
that by the
statute 18
Eliz. cap. 3.
they had no
power to
commit
any one for
I. **T**WO justices adjudged one H. to be the reputed father of a bastard child, and ordered him to maintain it; he entered into a recognizance, with sureties, to appear at the next quarter-sessions, which he did accordingly; and the sessions made another order, which he refusing to obey, they committed him. Hide Ch. J. said they ought not to have committed him for not performing their order made at the quarter-sessions, where they alter the former order, by which the first order of the two justices is made void; and this imprisonment being illegal, he was bailed by rule of Court. 2 Bulst. 341. Mich. 3 Car. B. R. The King v. Hammond.

not performing the order, but that the two first and next justices are to take bond for his appearance at the next quarter-sessions. Hide Ch. J. and the whole Court were clear of opinion, that the justices at their next quarter sessions ought to have made a final order, or to have affirmed or disallowed of the former order, and then after to have granted a reference of the cause to the same next justices of peace (if in the county) who made the first order for to consider better of it, and of the proof, and this had been according to the law; and there is added a note, that upon reading the statute 18 Eliz. cap. 3. and conference had among the judges, they all agreed that after an appeal to the sessions, if they repeal the first order, then the matter is as *res integra* before them, and they may then grant a re-reference of the matter to the two next justices.

2. Two justices adjudged one W. to be the reputed father of a bastard-child, and ordered him to maintain it; and upon his appeal from the said order to the next quarter-sessions, the justices in their sessions made a new order, by which they charged another person to be the reputed father of the child. Upon a petition by the inhabitants to the judge of assize, he refused to enter into the re-examination of the matter, but confirmed the sessions order, and said that it was final, and no appeal to be admitted against it; and that so it had been adjudged formerly, and of late, diverse times in B. R. and so he affirmed the former order. 2 Bulst. 355. by Jones J. at Gloucester assizes, 20 July. 13 Car. The case of Wood and Cole of Beckford.

Cro.C. 341.
pl. 5. and
350. pl. 15.
S.C. accord-
ingly, and
so P. was
discharged.
—S.C. cited
by Jones
justice of
assize ac-
cordingly,
and the last
order to be
an illegal
order. 2 Bulst. 355, 356 at Gloucester assizes, 20 July, 13 Car. in the case of Wood and Cole of Beckford.
3. Two justices made an order upon P. to maintain a bastard-child. P. appealed to the quarter-sessions, where they quashed the said order, and discharged P. Afterwards at another quarter-sessions, the matter was re-examined, and by a new order they adjudged P. to be the reputed father, and that he should keep the bastard; and he refusing to obey that order, was committed. The whole Court agreed, that when the first order was reversed upon appeal, the statute 18 Eliz. was satisfied, and that no justice of peace, nor the quarter-sessions, could by any statute make a new order concerning the same matter. Jo. 330. pl. 3. Hill. 9 Car. Pridgeon's case.

4. An

4. An order was made by 2 justices, to remove a poor person from Woking to Oswell; and upon an appeal the *sessions* ordered the justices' order to be superseded, and that the person should be removed to Woking. It was objected, that by the act of parliament the sessions have only power to affirm or quash, but not to supersede an order, or to suspend it for a time; and here they have made an order upon a 3d parish not concerned, by mistaking (Woking) for Woking, and therefore must be void, and that the word aforesaid would not help it, because Oswell was the parish last mentioned; it was referred to a judge of assize. 2 Salk. 472. pl. 5. Pasch. 8 W. 3. B. R. The Inhabitants of Oswell v. Woking.

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5. Two justices make an order on the 20th November, to remove the pauper and his family from A. to B. and at the next sessions no appeal being brought the parish of A. gets the order to be confirmed, and at the Easter sessions following the parish of B. and appeals then the order of 2 justices, together with the order of confirmation, is set aside. Now it was moved to set aside the last order of sessions, and that the two former orders might stand. It was resolved, that the *sessions* have no authority to confirm original orders for want of appeal; for they have no jurisdiction to confirm or reverse orders but on complaint made; and the statute, which bars the party grieved of an appeal after the next sessions, makes such order of confirmation needless; for which reasons the Court confirmed so much of the order of appeal as set aside the original order, but quashed it so far as it repealed the former order of sessions, because that was void in itself, and one quarter-sessions cannot revoke the acts of another. Trin. 16 Geo. 2. B. R. Parishes of Northbrady v. Rhode.

(H) Power to make original Orders.

1. SESSIONS ordered a man from A. to B. on the account of being a poor inhabitant, and ordered B. (the place of his former abode) to receive him. Per Whitlock, they have no power to make such order, unless he had been *impotent*, and so within the 43d Eliz. or *actually chargeable* to the parish, otherwise he might provide for himself where he could get a house. 2 Bulst. 347. 17 Car. Ville de Kimmalton v. Laytas.

Dalt. Just. cap. 73. cites S. C. — a Show. 293. S. C. cited. — The sessions cannot make an original or-

der for the removal of a poor person. a Show. 503. pl. 463. Mich. 2 Jac. B. R. The King v. Bond. — It was resolved, that the sessions had no power to make orders for settling poor, but their business was only to *quash* or *confirm* orders, on appeal to them. 12 Mod. 976. in case of the parishes of Ovencot and Grindow.

2. Where an order ought to be made by the two next justices by a statute, an original order made at sessions is ill, and was therefore quashed, though it was insisted, that if it be made by all the justices, &c. then it is by two, and that they shall be supposed to be at the general sessions. Comb. 25. Trin. 2 Jac. 2. B. R. The King v. Griesly.

3. Sessions

3 Mod. 369. 3. Sessions cannot make an original order for *taking apprentice*, S. C. but but it ought to come thither by appeal. Comb. 166. Mich. not S. P.—1 W. & M. B. R. The King v. Fairfax. Show. 76. S. C. and

S. P.—Carth. 94. S. C. but not S. P.—Upon exceptions taken to an original order of sessions for *discharging an apprentice*. Holt Ch. J. was strongly against it. 12 Mod. 349. Pasch. 12 W. 3. King v. Hayes.—But note, Trin. 1701. it was unanimously resolved that such order made at sessions at the first step was good; and Holt said he was brought to that resolution rather from the *necessity of the thing*, the *practice being also*, than any reason he saw for it.—12 Mod. 350. cites it as the case of the King v. Johnson, and the King v. Fenwick. 12 Mod. 553. Trin. 23 W. 3. S. C.—1 Salk. 68. pl. 6. S. C. accordingly.—2 Salk. 491. pl. 56. S. C.

Poor's

Settlements

205. pl. 246.

cites S. C.—

Carth. 279.

S. C. but

not S. P.—

Where authority is given to 2 justices of peace, without mention of appeal, there an order may commence at the session, else not. Per Holt Ch. J. Comb. 345. Mich. 7 W. 3. B. R.

Anon.—S. P. * Per Holt Ch. J. Ld. Raym. Rep. 426. Hill. 10 W. 3. in case of the King v. the Inhabitants of Boughton.

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Poor's

Settlements

202. pl. 244.

cites S. C.—

S. P. And it

was insisted

in this case,

that the se-

cond order

did not in-

terfere with

the first, be-

cause the

person

chargeable

is not sent

back to the

place from

whence he

came, but to

a 3d place,

which was

the place of

his last resi-

dence. The

Court

doubted of

this matter,

and raised

a question

whether the

next sessions

shall be

taken to be

the next

after the

making of the order, or the next after the parties find themselves grieved. But it was agreed by all,

that two justices of the foreign county could not by an order send the poor man back again to the

place from whence he came, for that would make an *interfering of jurisdictions*; but at last the

order of Cheshire was quashed for being informal, and so the points above were not determined.

Carth. 287, 288. S. C. by name of the King v. the Parishioners of Huntingdon.

4. In some cases the justices may make an original order at the sessions, as to *charge the grandfather*, &c. Per Eyres J. Comb. 208. Trin. 5 W. & M. B. R. in case of Shermanbury Parish v. Boldney Parish.

5. One Lucas, an old blind man, was *born at W.* in Lancashire, and after was *settled as a servant at H.* in Cheshire, and thence *removed himself, and was settled at S.* in Herefordshire, where he became blind, and *thence to return to W.* in Lancashire, whence two justices removed him by order, &c. to H. in Cheshire, and two justices in Cheshire made an order to *remove him to S.* in Herefordshire. It was moved to quash the order of Cheshire, because they should have appealed to Lancashire, and could not make an original order; for otherwise the poor would be tossed about from pillar to post. Curia (absente Holt Ch. J.) *hæsitavit*. And at another day Mr. Cheshire prayed that the order of the justices of the sessions might be affirmed; for the order of Lancashire is binding to Cheshire quoad Lancashire only, but doth not hinder them from finding a new place of settlement; and the statute 14 Car. 2. cap. 12. which directs the persons grieved to make their appeal to the next quarter-sessions, cannot be taken to extend to foreign counties. 1st, Because of the shortness of the time; for it must be to the next sessions. 2dly, Because of the distance of place, which may be to the remotest part of the kingdom. Holt Ch. J. said the first order of two justices is good till reversed, but whether the order of Cheshire be good as an original order *hæsitavit*. The Sol. Gen. said, the justices of Cheshire can make no order to that of Lancashire, and consequently cannot remove him to another place; for the terminus ad quem is part of the order, as well as the terminus a quo. Comb. 218. Mich. 5 W. & M. B. R. Lucas's case.

6. The justices of Middlesex made an *order at their sessions for reimbursing one Duncomb surveyor of the highways*, upon the new statute; and it was moved to quash this order, for that it appeared Mr. D. had first applied to the special sessions, where the justices refused to meddle, then he applied himself to the general sessions as a person aggrieved. Holt Ch. J. said, it comes to the general sessions *per saltum*; for it cannot be by way of appeal, where the justices have done nothing before; and though it was urged by Sir T. Powys, that there is another clause in the act, which gives an original jurisdiction to the sessions, to that Eyres J. answered, that is only where former statutes about repairs do not reach, and upon affidavit, &c. He said further, it seemed doubtful whether a surveyor can be reimbursed by this statute for any thing but gravel, though he thought he might, &c. Comb. 235. Hill. 5 W. & M. in B. R. The King and Queen v. Islington Inhabitants.

7. If a poor person be *removed from one place where not legally settled the sessions upon appeal may quash the order, but cannot remove her to a third place*; per Holt. Comb. 286. Trin. 6 W. & M. B. R. Wale's case.

Poor's Settlements, 190. pl. 235. cites S. C.—S. P. For they can but

affirm or reverse. Comb. 396. Mich. 8 W. 3. B. R. Bull's case.——Poor's Settlements, 190. pl. 234. cites S. C.—S. P. 3 Salk. 254. The King v. the Parish of Winley.——Two justices removed a man from Terrent Keinton, and adjudged him to be legally last settled at Tirrin Crawford, upon which they appealed; and there it was ordered, that it appearing to the sessions that he was last settled at Amner, therefore they discharge Tirrin Crawford, and order the poor man to be removed to Amner: this was quashed, because this was to make an original order, which the justices at sessions have no power to do; they might have reversed the first order, and ordered the party to be carried back to Terrent Keinton, but they could not remove the party to Amner, a third parish, who was no ways concerned in the order or appeal; and if they are really chargeable with it, it must be at the complaint of * Terrent Keinton to two justices of the peace. 2 Salk. 475. pl. 13. Mich. 8 W. 3. B. R. Amner Parish's case.——Poor's Settlements, 268. pl. 306. S. C.

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8. Two justices removed a man from Honiton in the county of Devon, to South Beverton in the county of Somerset; they *appealed to the sessions in the county of Devon, where the order was reversed*. Now two justices in the county of Somerset may by order remove him to Honiton again; for it is but an execution of the order of sessions, which could not otherwise be done; because it is out of the jurisdiction of the court of sessions. Comb. 401. Mich. 8 W. 3. B. R. Honiton Parish v. South Beverton.

Poor's Settlements, 189. pl. 233. cites S. C.

9. Sessions cannot make an order to *prosecute an offender out of the county stock*. 2 Salk. 605. Pasch. 2 Ann. B. R. The Queen v. Savin.

2 Ld. Raym. Rep. 871. S. C.

10. Two justices made an order of *bastardy*. The party *appealed*; the justices at sessions *set aside that order, and made an original order*, and held well; for they have an original authority. Poor's Settlements, 38. pl. 63. Pasch. 1712. B. R. The Queen v. Cripps.

6 Mod. 175. The Queen v. Crisp is a different case.

11. The *justices made an order which was to continue till sessions, and then the sessions made an order, and both orders were quashed*; because the sessions making an original order is void. Poor's Settlements, 33. pl. 53. Hill. 1713. Braiton v. Usley.

12. The

An order is made at the sessions upon an appeal against an appointment of overseers of the poor, which was discharged, and a new appointment was made of other persons. Powel, there must be two substantial inhabitants appointed, and if these are discharged at the sessions it must go back again to the two justices to appoint others, but the order was quashed for a fault in the caption. MS. Cases. Hill. 10 Ann. B. R. The Queen v. Overseers of Malden Redbreth.

12. The sessions have no original power to appoint overseers. Poor's Settlements, 123. pl. 168. Mich. 1726. The King v. the Inhabitants of Chilmarton.

(I) Power of Sessions over their own Orders.

On appeal from an order of removal made by two justices, the sessions confirmed the order, and after in the same sessions reversed it. Both the orders being returned on a certiorari, the Court held, 1st, That the judgment is in the breast of the justices, and alterable by them all the same sessions. 2dly, That a subsequent order directly contrary to a former made in the same sessions in the same cause is an absolute repeal of the former, as being inconsistent with it, though there are no express words of repeal in the 2d order. 6 Mod. 287. Mich. 3 Ann. B. R. St. Clement's Parish v. St. Andrew's Parish. — 2 Salk. 606. pl. 5. St. Andrew's Holbourn v. St. Clement's Danes, S. C. accordingly; and Holt Ch. J. said, that by the 2d order of the sessions, the first order there ceased to be a record. — Poor's Settlements, 168. pl. 215. S. C. — Holt Ch. J. in the principal case, 6 Mod. 287. cited a CASE OF THE TOWN OF COLCHESTER in B. R. some years ago, exactly like the principal case; and there, because the 2d order did not expressly repeal the first order; and because the justices returned them both as orders, the 2d order was quashed and the first set up. — And 2 Salk. 607. Holt Ch. J. said, the sessions ought to have set the first order wholly aside, and to have entered up the last order as the only order; for the effect of the Court's setting aside the first order, is, that it ceases to be an order, and consequently ought not to have been returned to B. R. as an order vacated by another order, but * it should have been annulled, and made nothing; as in B. R. the Court cannot enter up one judgment on record, and then enter a vacat of that, and then enter a contrary one. The sessions as well as the term is but one day in law. But the matter was referred to three puisne judges, and so it rested. — 2 Salk. 494. pl. 61. S. C. & P.

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(K) Power to delegate Authority to Justices.

1. SESSIONS shall set a rate for relief of children by their parents, but they can not transfer their authority to other justices of peace to do it. Sti. 154. Mich. 24 Car. B. R. The King v. Humphries.

* 2 Bulst. 343. Mich. 6 Car. B. R. S. P. in case of the king v. Smith. —

2. Two justices upon complaint order one R. to keep a bastard-child, the sessions vacated the order, and referred it back again to the justices, who did nothing further; the next sessions one Burwell was adjudged the reputed father and ordered to pay so much

much a week, &c. until the child was 12 years old; this order was removed into B. R. They resolved, that the sessions could not * refer the matter back to the justices; and that the last order was void, it being to pay so much per week until the child was 12 years old, but it should be, as long as it is chargeable to the parish; for the father might take it when he would. 1 Vent. 48. Mich. 21 Car. 2. B. R. † Burwell's case.

† Mod. 20. pl. 54. S. C. Keeling said, they ought to have quashed the order made by the two justices. And

Twisden J. said, they may vacat the first order, and refer it back as res integra.

3. A judge of nisi prius by consent of the parties may make a rule to refer a cause, but the sessions cannot do so, though by consent. They may refer a thing to another to examine, and make a report to them for their determination, but can not refer a thing to be determined by the other. Per Cur. 2 Salk. 477. 8 W. 3. B. R. The King v. Harding.

Poor's Settlements, 269. pl. 307. cites S. C.—S. P. agreed per Cur. 1 Salk. 383. Pasch. 1 Ann. B. R.

in the hundred of Blackheath's case. ——— Holt Ch. J. said, he was not satisfied that the sessions can ever refer the examination of a matter to a certain number of themselves, because they are all judges of the fact, and therefore they transact it as judges in court; but allowed they may refer the examination of the fact, and reserve the judgment to themselves, yet doubtless they cannot give a power to make rates and orders. 5 Mod. 87. Mich. 2 Ann. B. R. The Queen v. Glynn. ——— Poor's Settlements, 217. pl. 258. cites S. C.

4. J. H. a poor person complained to the sessions, that he being a lame seaman, and reduced to a very low condition, and obliged to sell part of his house, yet he was charged with 9s. per ann. to the poor, and prays to be relieved of this charge. The sessions made an order to refer it to two justices, and they to report it to the next sessions. The two justices made a final order. It was objected, that the sessions cannot delegate their authority. Per Cur. they may make an order to refer it to two justices; but then they must report it to the next sessions, and the sessions must make the order final. But that formality not being observed here, the order of the two justices is ill; and it was quashed. Poor's Settlements, 8. pl. 13. Hill. 1712. The Queen v. the Inhabitants of Limehouse.

5. An order made upon passing an overseer's account, and confirmed on appeal, was quashed, because the examination of the matter was referred by the court of sessions to some gentlemen, upon whose report the order was made. MS. Cases. Anon.

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The Court was moved to quash two orders of quarter-sessions

made by the justices of peace for the county of Middlesex, the case was this, a church-warden of the parish of St. Mary, Islington, and who acted as overseer of the poor, came to pass his accounts before two justices, who disallowed several items therein, (viz.) one of 26l. for a perambulation dinner, another of for new bell-ropes, and ordered him to pay the money to his successor, which he did accordingly, but * appealed to the quarter-sessions, and the justices ordered 4 or 5 of the bench to examine the disallowed items and report the same at the next court, and at the next court the said items were allowed, and the successor ordered to pay back the sum he had received if he had money. It was alleged, that the 1st order of quarter-sessions ought to be quashed because the justices could not delegate their judicial authority to others; but it was held per Cur. that the examination of the account by those appointed was only in aid of the Court, and well. It was insisted, that the 2d order ought to be quashed, because it was grounded upon an allowance of such of the said churchwardens disbursements of the poor's money as ought not to be allowed. But per Parker Ch. J. this court has not been nice as to the things in which the poor's money is laid out, so that it be in such things for which the parish was ratable; for such disbursements prevent a multitude of rates. And as to the words of this order, viz. If he had money, it was held they signified when he should have money. Both orders were confirmed. MS. Cases. Mich. 4 Geo. B. R. Parish of Islington.

(L) Their

(L) Their Power as to Arrests.

Sid. 269. pl. 28. S. C. and that upon the second motion, the Court doubted whether such privilege extended to such inferior courts, or only to the courts here.——— **S. C. Raym. 100.** that the pleading this habeas corpus by the sheriff seemed to be ill, because the justices cannot cause an arrested person to be dismissed. And cites **Brownl. 15. WILSON'S CASE**, where the Court held, that if a man be arrested in the face of the Court, the Court has power to discharge him, but not otherwise.

1. **A** PERSON was arrested as he was coming to the sessions, whereupon the justices of the peace granted a habeas corpus to discharge him, for that he ought not to be arrested eundo & redeundo, &c. Windham and Twisden J. inclined that the privilege ought to be allowed; but per Kelyng, the justices of peace cannot grant habeas corpus: et adjournatur. Lev. 159. Hill. 16 & 17 Car. 2. B. R. Clarke v. Molineux.

(M) Power of an after Sessions to controul a former.

Sec(G)pl. 5. 1. **T**HERE had been time out of mind one constable for Ratcliff, Shadwell, and Old Wapping in Middlesex, who joined in relief of their poor, but the number of their houses and inhabitants greatly increasing within 30 years last past, they made several constables, and relieved their poor separately; but the poor of Shadwell increasing, so that they were not able to relieve them, they complained to the sessions when Hide Ch. J. and Windham J. were present; and it was then ordered that these parishes should be joined again, and relieve their poor together; but afterwards, at another sessions, where Sir John Robinson, a justice of peace of Middlesex was chairman, it was ordered, that they should be severed again; which last order was quashed; because the sessions cannot alter an order made in the sessions where any judges of B. R. are present; because by the statute, matters of difficulty are to be judged by them, so that what they order is of greater authority; besides the justices of peace had no power concerning the poor before the statute 43 Eliz. and even by that statute they have no power to sever parishes; for which reason several acts of parliament have been additionally made for several parishes in the north. Sid. 292. pl. 9. Trin. 18 Car. 2. B. R. The King v. the Inhabitants of Ratcliff, &c.

[350] 2. An order was made to remove one from C. to B. and this order, being appealed from, was confirmed at the sessions; but the sessions after that made an order of review, and quashed the former order of sessions, because made by surprise. And per Cur. the order of review must be quashed; for the justices have no power after the first sessions. 2 Salk. 477. Hill. 8 W. 3. B. R. Inhabitants of Cockfield v. Boxstead.

Comb. 418. Hill. 9 W. 3. B. R. S. C. Poor's Settlements, 297. pl. 221. cites S. C.

(N) Costs upon Appeal.

1. 8 & 9 Will. 3. **E**NACTS, that the justices in the quarter-sessions, upon any appeal concerning the settlement of any poor person, or upon any proof before them made of notice of such appeal, shall order to the party, for whom such appeal shall be determined, or to whom such notice did appear to have been given, such costs as by the justices shall be thought just, to be paid by the churchwardens, overseers, or any other person against whom such appeal shall be determined, or by the person that did give such notice; and if the person ordered to pay such costs, shall live out of the jurisdiction of the Court, any justice of the county, &c. wherein such person shall inhabit, is required, upon request made, and a copy of the order for costs produced, and proved by warrant, to cause the money mentioned in that order, to be levied by distress and sale of goods; and if no such distress can be had, to commit such person to the common gaol, there to remain 20 days.

2. 5 Geo. 2. cap. 19. S. 2. Enacts, that no certiorari shall be allowed to remove any order, unless the party prosecuting shall enter into a recognizance, with sureties, before one justice of peace where such order shall have been made, or before one of his majesty's justices of B. R. in the sum of 50l. with condition to prosecute without wilful delay, and to pay the party in whose favour such order was made, within one month after the said order shall be confirmed, their costs to be taxed. And in case the party prosecuting such certiorari, shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall be lawful for the justices to proceed, and make further orders, as if no certiorari had been granted.

An order of sessions removed up by certiorari, being now confirmed by this court, it was moved for costs upon this statute, which the Court upon some consideration gave, tho'

at the first the Ch. J. something doubted. 2 Bernard. Rep. in B. R. 413. Pasch. 7 Geo. 2. 1734. The Parish of Thatcham v. the Parish of Bucklebury.

(O) Orders of Sessions. Good, or not, in respect of Form.

1. **O**RDER of sessions (on complaint of, &c. that A. was a poor inhabitant of the parish of B. and had lately intruded himself into the parish of C. &c.) and that A. is a settled inhabitant of B. and that the overseers of B. receive him, with his wife and his family, into their said parish of B. and provide for them as their poor, according to law, and that the inhabitants of the parish of C. be discharged, &c. Adjudged good, though not said that he was likely to become chargeable, or that he was an inhabitant of C. but only that he had lately intruded himself, &c. 2 Show. 290. Pasch. 35 Car. 2. B. R. The King v. Chiffleton.

An order of sessions grounded on a complaint before two justices, concerning a settlement, need not mention that it did appear that the

man was likely to become chargeable; but it is otherwise in an original order. Carth. 222. Pasch. 4 W. & M. B. R. The King v. Colliton Parish.

2. A. B.

2. A. B. and C. *contest the settlement of a poor person*, and 2 justices adjudge him last legally settled at A. A. *appeals*; sessions repeal the order, and *order him to be removed to C.* as last legally settled there; but the sessions order did *not recite that C. was heard on the appeal*, yet held good, because C. was a party to the original order, and consequently to the appeal; otherwise sessions could not have charged them, as not being before the Court. Carth. 221. Pasch. 4 W. & M. The King v. Colliton Parish.

3. An order made by two justices, for settling a poor man at such a place, was quashed at the sessions; but because it *did not appear that it came before them by way of appeal*, the order of sessions was quashed; for they have not original jurisdiction, but it must be brought before them by appeal. 3 Salk. 257. pl. 9. Pasch. 9 W. 3. Tudy v. Padstow.

So where a conditional order was made, in case the court of B. R. should be of opinion that where

4. An order of sessions drawn up specially, in order to have the opinion of the Court, was concluded, *and if the Court shou'd be of opinion, then, &c.* which was held naught; for the justices *ought to determine one way or other*, and not make a special conclusion, referring to the Court; but it was referred to the judge of assise. 2 Salk. 486. pl. 46. Hill. 11 W. 3. B. R. Anon.

a servant was hired at a fair ten days after Michaelmas till Michaelmas next, such hiring and service did gain a settlement then, &c. and for this the order was quashed. 12 Mod. 323. Mich. 11 W. 3. B. R. Parish of Grindon in Northamptonshire, and Overcott in Warwick.——12 Mod. 376. Pasch. 12 W. 3. B. R. S. C. by name of OVENCOTT v. GRINDON, and reports it, that the order of sessions recited an order of 2 justices, for the settling a poor person in the parish of O. and concluded *in the nature of a special verdict*, viz. If the poor person of right belongs to the parish of O. we confirm, if to the parish of G. we quash the order; but to which it does belong of right, we submit to the court of B. R. Per Cur. we are bound *ex debito justitiæ*, to confirm an order, if nothing appears why it should be set aside; and the order of sessions was quashed, and the other confirmed.

So an order of sessions, which was, whereas we are informed by the churchwardens, &c. was quashed. 12 Mod. 407. Trin. 12 W. 3. B. R. Parish of Erith v. that of Orford.

5. An order of sessions was quashed, for that it was, that the person was *likely to become chargeable, as we are credibly informed*. 12 Mod. 323. Mich. 11 W. 3. B. R. Parish of Bloxom v. Kingston.

6. A motion was made to quash an order of sessions; the exception taken was, that it did not appear that there was *any complaint of the overseers*, only A. B. *Quorum unus, do order, &c.* 11 Mod. 222. Pasch. 8 Ann. B. R. The Queen v. the Inhabitants of Puttenham.

7. An order of sessions is made, upon an appeal from an order of 2 justices: *whereas upon the complaints of the churchwardens of such a parish, and upon hearing counsel, &c.* It was excepted, that it did not appear that either parish appealed: sed non allocatur, it being said *upon hearing of counsel*. MS. Cases. Trin. 10 Ann. B. R. The Queen v. St. Peter's in Hereford.

On an appeal to the sessions, the Court discharged the first order.

8. Two justices made an order, to which the parish appealed: the sessions *set aside the order*; and it was moved to quash the order of sessions, it *not appearing that it was upon hearing the merits*; for the statute never intended that an order defective in law should conclude

conclude, and the sessions have no authority unless it came regularly before them. Adjournatur. Poor's Settlements, 8. pl. 12. Mich. 11 Ann. B. R. Saffron Walden v. Little Hempstead. And now it was moved to set aside the order of dis-

charge, because the justices do not say whether they discharge it for form or on the merits; for if it was for form the parish is not bound; but if on the merits, the parish, in consequence, is hereby discharged for ever; and per Cur. 1st, The justices are not bound to express the reason of their judgment in the judgment no more than other courts; and if it was otherwise held in the late chief justice's time it passed without consideration. The reason of their judgment must be collected from the record; as where judgment is arrested upon an insufficient indictment. If the sessions reverse the first order, and that being removed appears to be good, this court must intend it was reversed on the merits, and affirm the order of sessions. If the sessions reverse the first order, and that being removed appears not to be good, we must intend it reversed for form, and affirm the order of reversal; so if the sessions affirm the first order, and that appears to be good, we must affirm the order of sessions. But if the first order appears bad, and the sessions affirms it, this court must reverse it, because it appears naught. 2 Salk. 607, 608. Mich. 9 Ann. B. R. Parish of South Cadbury v. Parish of Braddon.———Poor's Settlements, 172. pl. 217 cites S. C.———MS. Cases, S. C. by name of the Queen v. South Cadbury and Braddon.

† An order of sessions, that quashes an order of the two justices, is good, though it gives no reason. MS. Cases. Mich. 8 Ann. The Queen v. Inhabitants of St. Giles in Reading. It need not set forth whether the said order was quashed for form, or upon the merits.

9. The sessions confirmed the original order: it began thus, upon hearing the appeal of Burcot, it was moved that the parish itself cannot appeal, but the inhabitants; so it is nonsense and an absurdity; but it must be intended the parishioners, and can have no other intendment. Poor's Settlements, 25. pl. 35. Hill. 1712. B. R. The parish of Eaton v. Burcot in Oxon. It is a rule of the court of B. R. that whenever an order upon the face of it may be taken to be good,

or bad, the Court will always suppose it to be right. Foley's Poor Laws, 279. Anon.

10. The sessions appoint two of the inhabitants to be overseers, not said substantial inhabitants, as the statute directs; and quashed per Cur. Poor's Settlements, 123. pl. 168. Mich. 1726. B. R. The King v. the Inhabitants of Chilmarton.

(P) Orders of Sessions. Quashed for what. See (O)

1. IT was moved for setting aside of an order of sessions for the settling of a poor person in a town which had been sent thither by an order of 2 justices; and it was confirmed upon an appeal to the sessions. But the Court would hear nothing of the merits of the cause, the order of sessions being in that case final, unless there had been error in form. 1 Vent. 310. Pasch. 29 Car. 2. B. R.

2. An order of sessions was refused to be quashed, because requiring something out of their power nobody was hurt by it, and therefore did not affect any body. Carth. 161. Mich. 2 W. & M. B. R. The King v. Moor.

3. The sessions, upon appeal, made an order to return a poor man to the parish whence he was removed, but did not by any express words vacate the 1st order: but per 2 J. contra Holt Ch. J. The sessions-order vacates the order of 2 justices by implication; because it orders the contrary, and that is sufficient; and so the order

Poor's Settlements, 248. pl. 286. cites S. C.

was confirmed. Carth. 222. Pasch. 4 W. & M. B. R. The King v. Hartfield Parish.

3 Salk. 257.
S. C. by
name of Tu-
dy v. Pad-
flow.—
Poor's Set-
tlements,
254. pl. 294.

4. An order made by 2 justices of the peace for settling a poor person, was quashed by the sessions; but because it did *not appear that it came before them by way of appeal*, without which they have no jurisdiction, this order of sessions was quashed. 2 Salk. 479. pl. 25. Pasch. 9 W. 3. B. R. Anon.

5. Order was made at sessions *for relief of poor prisoners in gaols, and providing materials to set them on work*, upon the statute of 14 Eliz. cap. 5. and 19 Car. 2. cap. 4. by which a sum was assessed on the several parishes, not exceeding what is allowed by both acts; but it was quashed, because they *ought to make distinct orders upon the different statutes*; the money to be levied by virtue of each statute being applicable to different purposes. 2 Salk. 487. pl. 47. Hill. 11 W. 3. B. R. Eaton-Bridge Parish v. Westram Parish in Kent.

Poor's Set-
tlements,
171, 172.
pl. 216. S. C.

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6. A justice of peace was surveyor of the highway, and a *matter which concerned his office coming in question at the sessions, he joined in making the order*, and his name was put in the caption. And per Holt Ch. J. it ought not to be, as if an action be brought by the chief justice of C. B. in the court of C. B. the placita must be coram Ed'ro Nevill Mil. & sociis suis, and not coram Thoma Trevor, &c. And it was quashed. 2 Salk. 607. pl. 6. Hill. 3 Ann. B. R. The case of Foxham Tithing in Com. Wilts.

MS. Cases.
Hill. 11
Ann. B. R.
S. C. by the
name of the
Queen v.
the Inhabi-
tants of
Horsley and
Spalding.
And says,
that upon
a proposal
made to go to trial the order was quashed by consent.

7. Thomas Hobbs, his wife, and 3 children, being removed from Horsley to Smalley, they appeal to the sessions; the sessions make an order, reciting, that *whereas it appears to them*, upon hearing counsel on both sides, *that the boundaries of the parish came in question, and that they have no power to inquire into that matter* they set aside the order of the 2 justices; but the sessions-order was here quashed; for per Curiam they have power to *inquire into the boundaries of a parish* concerning settlements. Poor's Settlements, 9, 10. pl. 14. Hill. 1712. Smalley Parishes's case.

8. The justices made an order to remove Ann Morgan and her children from Langueren, upon her oath that she was last settled at Panteed, her husband being gone for a soldier. The sessions quashed the order, it not being upon the oath of the husband: but the order of sessions was quashed here, being set forth in the order that the husband was beyond sea. Poor's Settlements, 13. pl. 18. Trin. 12 Ann. Langueren Parish v. Panteed Parish.

9. The sessions quashed the original order for insufficiency, when it was good, and the sessions-order was quashed in B. R. for that reason. Poor's Settlements, 35. pl. 56. Trin. 1714. The Queen v. the Inhabitants of Mells.

10. It was moved to quash an order of sessions, which quashed an order of 2 justices, and recited as a reason of their quashing it, *that there was not due notice given of the appeal, pursuant to the act*.

of

of 9 Geo. And per totam Curiam the order of sessions must be quashed, because they said that due notice not being given, was no reason to quash the order of 2 justices, but might be a reason to adjourn the appeal. Foley's Poor Laws, 245. Trin. 10 Geo. B. R. Anon.

11. On rule to shew cause why an order of sessions should not be quashed, several exceptions were taken to it by counsel. The order he said was *made upon an appeal from the disbursements of certain churchwardens and overseers of the poor for the year 1730.* On this appeal the Court of sessions adjudged, that these officers had made *several disbursements not warrantable by law, and therefore ordered, that they should pay the sum of 11l. being the amount of those disbursements to the subsequent churchwardens.* The exceptions taken to this order was, 1st, *That by the statute of 43 Eliz. the first application ought to have been 2 justices; but in the present case, the application was to the sessions in the first instance.* 2dly, *That the appeal appeared to have been made at a former sessions, and no order for the adjourning it, so that there was a discontinuance.* 3dly, *That it does not appear at what time the first sessions was holden, which is necessary; because by act of parliament these quarter-sessions can be held only at particular times.* 4thly, *That the disbursements of churchwardens are not under the jurisdiction of the justices of peace, but only the disbursements of overseers.* 5thly, *That the order is made upon 4 persons to pay the 11l. whereas it ought to have been specified, what part each of the persons ought to pay.* 6thly, *That the order requires the money to be paid to the subsequent overseers not naming them, and it does not appear that there were any overseers then in being.* But the other side prayed a day to answer these exceptions; and accordingly the rule was enlarged. Ex Relatione. 2 Barnard. Rep. in B. R. 228, 229. Hill. 6 Geo. 2. 1732. The King v. Barfield.

(Q) Quashed. In Part.

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1. A WOMAN was removed by order of 2 justices of the peace to her husband, and upon appeal to the sessions it is there ordered, that the man and his wife be removed to the same place, whence the woman was removed before. Now upon motion this order of sessions was quashed quoad the husband. Comb. 227. Mich. 5 W. and M. in B. R. Knight's case.

2. An order was made at the sessions that an order of 2 justices touching the settlement of A. be discharged, and that A. be settled at B. Per Cur. they could only discharge the order of 2 justices, therefore let that part be confirmed, but they could not appoint a new place of settlement, therefore let that part be quashed; for the Court may confirm in part and quash in part, as is frequently done in orders touching * bastard-children. Comb. 286. Trin. 6 W. & M. B. R. Haines's case.

Poor's Settlements, 152. pl. 201. cites S. C. — S. P. Farr 10. Pasch. 1 Ann. B. R. The Queen v. Milverton Parish. —

Poor's Settlements, 206. pl. 247. cites S. C. — S. P. Nelf. Just. 545. — * S. P. Per Holt Ch. J. Comb. 264. Trin. 6 W. & M. B. R. Anon. — Poor's Settlements, 151. pl. 199. cites S. C.

Poor's Set-
tlements,
221. pl. 266.
S. C.

3. An order made originally at quarter-sessions set forth, that whereas the parish of D. was burdened with poor, and that E. had no poor, therefore D. should be annexed to E. and that the occupiers of lands there should contribute 20l. per ann. by equal monthly payments to D. as long as D. should be overburdened with poor, and E. had none. Per Holt Ch. J. by the statute 43 Eliz. the sessions may tax particular persons in aid to that parish which cannot relieve its own poor, or they may assess the whole parish in a certain sum, and leave it to the parish-officers to collect, and levy the same of particular persons, which was well done in this particular case, but that so much of the order as concerns the annexing of the parishes is void. 2 Salk. 480. pl. 31. Hill. 9 W. 3. B. R. Dimchurch v. Eastchurch.

(R) Of their Entries and Proceedings.

But if it
were ad ses-
sionem, in a
borough in-
corporated,
it were
good, tho'
it were not p^o burgo.

1. **A**N indictment was quashed, because it was *justiciarii ad pacem conservand.* assign. and not *ad pacem domini regis*; neither would *ad pacem publicam* serve; and for another reason, because it was *ad sessionem.* In com. tent. and not *pro com.* Vent. 39. Trin. 21 Car. 2. B. R. Anon.

Poor's Set-
tlements,
245. pl. 285.
S. C.

2. No caption of an order of sessions was returned, but there was only the stile of the sessions on the top; but it was not said that *ordinatum fuit prout sequitur, &c.* but the order was distinct without relation to the stile; sed non allocatur, but held well enough. Carth. 222. Pasch. 4 W. & M. B. R. The King v. Colliton Parish.

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5 Mod. 329.

The King
v. Turner.

S. C.—

So an order
of 2 justices
was repeal-
ed at the
sessions, and
being re-
moved by
certiorari
into B. R.
one excep-
tion (among
others) to
the order

3. Indictment for refusing to relieve and maintain Elizabeth, the wife of his son John Turnock according to an order made in the sessions, which order was set forth in the indictment in hæc verba, viz. *Ad generalem sessionem pacis tent' apud Marl' in E' pro com. Wilt's, &c.* And at the motion of Mr. Eyre the indictment was quashed, because the order was only said * to be made at the general sessions, and not at the general quarter-sessions; for the quarter-sessions are appointed by 2 H. 7. cap. 4. though it appears by the same statute, that there may be a general sessions at other times; and 43 Eliz. cap. 2. S. 7 appoints orders in these cases to be made at the general quarter-sessions. 2 Salk. 474. pl. 11. Mich. 8 W. B. R. The King v. Turnock.

of sessions, was that it was *ad generalem sessionem, &c.* but did not say *quarterialem*; and the statute is express in directing the appeal before the justices at their quarter-sessions; and this being a new law and a new jurisdiction, ought to be literally pursued. And Holt Ch. J. was of that opinion, and two justices contra; therefore it was adjourned to search for precedents, and upon search, they were found to be both ways, and almost equally in number. Carth. 222. Pasch. 4 W. & M. B. R. The King v. Colliton Inhabitants.

So an order upon H. for maintaining his daughter was quashed, because it was recited to be made *ad generalem sessionem pacis*, and not *ad quarterialem sessionem pacis*, according to the statute of 43 Eliz. cap. 2. 2 Salk. 476. pl. 16. Hill. 8 W. 3. B. R. Purnall's case.—Poor's Settlements, 140. pl. 184. S. C.

Serjeant Hawkins says, that Mr. Lambard seems to make no distinction between general and quarter sessions, but to take them as synonymous terms: but it seems the better opinion, that *quarter-sessions are a species only of general sessions*, and that such sessions only are properly called *general quarter-sessions*, which are holden in the 4 quarters of the year in pursuance of the statute of 2 H. 5. 4. and that any other sessions holden at any other time for the general execution of the authority of justices of the peace which by the other statute the justices of the peace are authorised to hold oftener than at the times therein specified, if need be, may be properly called general sessions, and that those holden on a special occasion for the execution of some particular branch of their authority, may properly be called *special sessions*. 2 Hawk. Pl. C. 42. cap. 8. S. 47.

4. Exception was taken to the caption of an *order of sessions*, because it described the justices as *justices of the peace only*, and not as *justices of oyer and terminer*, but the Court over-ruled it, and said that the justices do not hold their sessions for the examination and judging of matters relating to the poor by force of their commission of oyer and terminer. MS. Cases. Hill. 4 Geo. B. R. Anon.

5. It is a regular way in cases of appeals to the sessions about settlement, to enter the appeal before the two justices that made the order, and they to return the order with the appeal into the sessions; per Holt. Powel said, they always did otherwise, however this would be a good rule. MS. Cases.

(S) Private Sessions.

1. A PRIVATE sessions of the peace is not said to be held for the county; per Roll. Ch. J. Sty. 359. Mich. 1652. Anon.

2. If any thing be done at a private sessions of peace, it ought to be returned to a quarter-sessions, or into B. R. Per Roll, Ch. J. Sty. 360. Mich. 1652. in Staples's case.

(T) Next Sessions, &c. How understood.

1. AN order was made by two justices in sessions' time, about keeping a bastard-child. Whether the said sessions shall be said the next sessions within the statute of 18 Eliz.? Mod. 20. pl. 54. Mich. 21 Car. 2. B. R. Anon. [356]* The sessions was held on the 5th of October, and adjourned to the 19th and between these times an order of removal was made by 2 justices; the parish to which they were removed * appealed to the adjourned sessions; and whether that this is to be taken to be the next sessions within the act was the quære. The whole Court agreed, that if an order was dated before the sessions, and not served till after, then the sessions that came after the service of the order was the next sessions. Parker Ch. J. said, he took this to be well enough; and he could not distinguish this from the case of a person taking the oaths the same term he had a place, which by Holt Ch. J. was held well. Eyres J. was of a different opinion; and he thought that the next must mean that which was next after; and though some inconveniencies might arise from that construction, yet he took the law now to be so; et adjourn. Quære de Ceo. Foley's Poor Laws, 161, 162. Hill. 11 Ann. B. R. between the Parishes of Monk's Risborough and Prince's Risborough in Com' Bucks.

2. An order was made by the justices of the peace of Maidstone division in Kent, for keeping a bastard child from which there was an appeal to the sessions; several motions were made to quash the same. The Reporter adds, see the statute; for he says,

it seems
strong for
Keeling.—
Keb. 534.
pl. 34. and
Ibid. 546.
pl. 48. The
King v.
COSTING,
S. C. says,
that by
consent, the
order was
wholly
quashed,
and security
put in to
abide the

same. And after several debates, it was resolved, that the words in 18 *Eliz. cap. 3.* viz. *Next quarter-sessions shall be intended the next quarter-sessions held for that division of the county in which it was made*, and not the very next sessions in the county; for if so, then the appeal ought to be to the sessions at Canterbury, whereas this order was made in Maidstone division, and neither of those divisions intermeddle with matters done in the other division. *But Keeling J. contra*; for the next session must necessarily be intended the next in the county, and not that which shall be next in this division; inasmuch as the statute takes particular notice of Yorkshire, where there are such distinct sessions, and makes provision for that, and not for the other counties. *Sid. 149. pl. 14. Trin. 15 Car. 2. B. R. The King v. Coytan.*

order of the next sessions, and to pay the church-wardens their charges, and the rather for that Keeling insisted that the order ought to be *at the next sessions precisely*, unless where the law takes notice of any particular divisions, as in Yorkshire.

The next
quarter-
sessions to
which an
appeal must
be, is the
next after
the party is
grieved.

3. Whether the *next sessions* for an appeal to an order of settlement shall be taken to be the next after the making the order, or next after the parties find themselves aggrieved? *Dubitatur. Carth. 288. Mich. 5 W. & M. B. R. The King v. Huntingtown Parish in Cheshire.*

18 Mod. 336. Mich. 11 W. 3. Anon.

4. An order made *ad generalem quarterialem sessionem pacis tent' pro com' Suffolk per adjournamentum* was quashed; now it did not appear that this was the next general quarter-sessions, for it might be that the general sessions was begun, and continued by adjournment before the order was made. *MS. Cases. The Queen v. the Inhabitants of Hinderclieve.*

5. It was moved to quash an order of two justices; because by the caption of the order of sessions, it did appear that the appeal was not till one sessions had been past, so that the sessions had no jurisdiction, and the parties were concluded for want of appealing; sed per totam Curiam: the order of two justices might not be served till the first sessions was over, so confirmed the order. *Foley's Poor Laws, 89. Mich. 1 Geo. B. R. Parish of St. John's v. Parish of Milbrooke.*

For more of
this head
see Lamb.
Eiren Lib.
4. cap. 19.

(U) Of what they may inquire, and proceed there-
upon,

1. 2 H. 5. 4. **A**UTHORISES the justices in their sessions to examine all labourers, artificers, servants, and their masters upon oath, and to punish them for offences against the statute of labourers.

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Sid. 270,
pl. 26.
Trin. 17
Car. 2. S. C.
says it was
for a writ

2. Error of a judgment upon an indictment, before justices of peace, for * reciting a libellous and scandalous letter against M. to a feme, whom M. intended to marry. And the errors assigned were, 1st, That it was only a private letter, and not punishable by

by indictment. 2dly, If it be, yet not before justices of peace, but commissioners of oyer and terminer, who have words in their commission *de propalationibus verborum*. And for both causes Hide Ch. J. at the first held it erroneous; but in Trin. Term, after Hide being dead, Twisden, Keeling, and Windham held it indictable, because it tended to the breach of the peace, and before justices of peace, as well as before justices of oyer and terminer. Lev. 139. Mich. 16 Car. 2. B. R. The King v. Summers. ting a letter to a feme advising her not to marry M. because he was debauched, and had the pox, and was not worth a
 groat, and had declared, that if he married her, he would allow a whore 50l. a year. And this letter was not subscribed, but conveyed to her by S. and for this S. was fined at the sessions 200l. who brought this writ of error. S. C. Keb. 772. pl. 7. 788. pl. 42. Mich. 16 Car. 2. Adjournatur. and 931. pl. 40. Trin. 17 Car. 2. The judgment affirmed against the executors of Summers.

3. The sessions cannot *indict for petty treason*; per Holt Ch. J. 12 Mod. 111. Hill. 8 W. 3. Anon.

4. Indictment upon the 13 of *Eliz.* for making *cables* of old stuff concluding *contra formam statuti* generally; and the penalty given by the statute is *four times the value* of the cables, *to be recovered by bill of plaint or information*; and it was quashed nisi, upon this exception, that the justices of peace have no jurisdiction given them by the statute, and the indictment was taken before them at their quarter-sessions. 12 Mod. 514. Pasch. 13 W. 3. Anon.

5. So in case of an indictment upon the *statute of usury* against the lender; as was adjudged on writ of error. 12 Mod. 514. cites Trin. 4 Ann. Smith's case.

6. By 6 Geo. 1. cap. 21. S. 10. *Upon appeals to justices of peace in their quarter-sessions, against judgments given by justices upon informations, for offences committed contrary to the acts relating to the duties upon malt, and upon hides and skins, tanned, tawed or dressed, and upon vellum or parchment made in Great Britain, the justices in quarter-sessions shall proceed to rehear the truth and merits of the facts in question, and to re-examine the witnesses, and thereupon finally determine between the parties; and if any defect of form shall be found in such proceedings before the particular justices, such defects may be amended by order of such quarter-sessions.*

(W) Of Adjournment of Sessions.

1. **A**N adjourned sessions cannot invade or run into another subsequent sessions. Lutw. 911. in case of Thurston v. Slatford.

2. At the quarter-sessions *there may be a trial the same sessions, if there be an adjournment*, so as there may be 15 days between the teste and the return. 12 Mod. 50. Hill. 5 W. & M. B. R. Anon.

3. An order was made by 2 justices to remove S. from H. to R. who appealed, and at the adjourned sessions the two parishes agreed to put off the determination of the cause till the next sessions, Poor's Settlements, 256. pl. 296. cites S. C.

which sessions vacated the order of the two justices; and now it was moved to set aside that order; because the appeal ought to be at the next sessions by the statute 13 Car. 2. and 3 & 4 W. 3. there to be finally determined: and for this reason it was quashed. 3 Salk. 258. Hill. 8 W. 3. Spencer's Case.

Poor's Settlements
141. pl. 187.
cites S. C.—
12 Mod.
260. S. C. by
name of the
Inhabitants
of King's-
Langley v.

*4. A motion was made to quash an order of sessions, because the justices had adjourned the appeal from one sessions to another, and so the determination upon the appeal was not at the next quarter-sessions: sed non allocatur; for the appeal *must be lodged at the next quarter-sessions*, yet when it is lodged the justices may adjourn it: per Cur. 2 Salk. 605. Trin. 11 W. 3. B. R. The case of King's-Langley parish.

the Inhabitants of St. Peter's in St. Alban's. — S. C. Ld. Raym. Rep. 481. It was an appeal from an order for removal of a poor person. And per tot. Cur. The sessions may well adjourn an appeal upon debate for farther consideration. — Blackerby's Just. tit. Appeal, cites S. C.

* Where appeal lies to the next sessions, if it be then received and lodged there it is sufficient, and the justices may proceed upon it at the next sessions after. Cumb. 365. Pasch. 8 W. 3. B. R. Marsh's Case.

5. Indictment was taken at sessions held such a day by adjournment, *without shewing from what time* they had adjourned; and that exception was taken, but over-ruled. 12 Mod. 408. Trin. 12 W. 3. Anon,

Poor's Settlements
143. pl. 188.
cites S. C.

6. Though a sessions may adjourn from one day to another, and so sit by adjournment, yet it *must not appear* in a lump, as sitting 3 days together, but *distinctly*. 2 Salk. 605. pl. 2. Pasch. 1 Ann. B. R. Per Holt. Ch. J. in the case of Linfield parish v. Battle parish.

7. An indictment was found before the justices for the county of Lincoln against a constable for refusing to obey an order of the justices, and the defendant was tried, convicted, and had judgment given against him at a general sessions held the 3d day of May, (which was after the Easter sessions began) by the adjournment of the Epiphany sessions; a writ of error was brought, and it was alleged for error, that the justices cannot continue one general sessions to a day subsequent to the time appointed by 2 H. 5. cap. 4. for the holding another original sessions, and for that reason the judgment was reversed per tot. Cur. MS. Cases. Trin. 4 Geo. B. R. The King v. Grince.

(X) Informations against a Court of Sessions, or against Justices of Peace; For what.

1. **O**N rule to shew cause why an information shall not go against the defendant, the chief matter of complaint against him was, for that upon complaint being made to him as a justice of peace, that a certain person had stole some bonds belonging to another as administratrix, he committed him; whereas it is known law, that this was not felony till the late act of parliament, and this offence was before that act: for which reason it was said, this commitment

mitment was entirely illegal. The Court however refused to make the rule absolute, though they said, this was certainly *a great misdemeanor* in the justice. 1 Barnard. Rep. in B. R. 346. Trin. 3 Geo. 2. 1730. The King v. Taylor.

2. On a rule to shew cause why an information should not go against the defendants, who were by charter appointed justices of the sessions in the city of Sarum. The fact came out to be thus: The defendants had never held a court since the year 1723. the recorder of the city, who generally assisted at this assembly, being made chancellor of Ireland, and that they had little or no business; however, upon a mandamus coming down to them lately to make a rate, they were obliged to hold one, which they intended to do for that particular purpose only. When the Court was sitting a bill of indictment for a nuisance was offered to be preferred before them; but they had summoned no grand jury: and upon that they made an entry in their books, that this indictment should be rejected, giving this special reason for it, that they had assembled themselves as a court for this present purpose only of making a rate; and yet in the stile of the court they had called themselves a general sessions. The attorney-general submitted it, that this was a very unwarrantable act of power; and therefore prayed, that the rule should be made absolute. Judge Probyn said, that he had a doubt whether a general sessions had conusance of indictments for nuisances? To this the attorney-general answered, that he had heard it often said in this court, that every sessions at Hicks's-hall is a general sessions, and yet nothing is more known than that they hold plea upon these indictments constantly. However, the Court said, that as this was a particular franchise that had authority indeed to hold such a Court, but held them very seldom, they took it there was nothing in this case but a *mistake in judgment in the justices*, and therefore they discharged the rule. 2 Barnard. Rep. in B. R. 250, 251. Pasch. 6 Geo. 2. 1733. The King v. Eyres and others. [359]

3. On rule to shew cause why an information should not go against the defendant, the complaint against him appeared to be shortly thus: five boys had been committed by him for a theft, the goods stolen were carried to a pawnbroker's; upon which the justice sent to the pawnbroker's requiring him to bring the goods to him, in order that he might have them forth-coming at the trial: the goods accordingly were brought, produced by the justice at the trial, and the boys convicted. When the conviction was over, the party robbed applied to the justice for the goods; but he told him, the keeper of Bridewell, whose custody the boys were committed to, had been with him and informed him, that he had been at a good deal of expence in keeping the boys in prison, and attending with them on the trial, which came to 4s. per boy: upon which the justice told the party, that he must pay this money to the keeper, and that he should not deliver the goods to him till he had paid it. The money accordingly was paid, but afterwards 8s. of it was returned. Upon this state of the case the Court made the rule absolute; and said, that they thought the requiring the goods to be brought, and the money paid,

paid, were both illegal. 2 Barnard. Rep. in B. R. 379. Hill. 7 Geo. 2. 1733. The King v. De Veil.

For more of Sessions of the Peace in general, See Ale-houses, Apprentices, Bastardy, Poor, Removal, Settlement of Poor, and other proper Titles.

Settlements in Chancery.

(A) Settlements of Lands by Chancery, &c. What Limitations Chancery, &c. will direct.

[360]* 1. **U**PON a marriage, *articles were entered into, whereby it was agreed, that the wife's portion should be laid out in the purchasing of lands, which should be settled on the husband and wife for their lives *and the life of the longer liver of them, and after to the heirs of the body of the wife by the husband to be begotten: yet the master of the Rolls decreed the settlement to be to the first and other sons, &c. so as the husband and wife may not have power to bar the issue.* Abr. Equ. cases 392. Mich. 1698. Jones v. Laughton.

In marriage articles the issue are particularly considered and looked upon as purchasers; and for that reason the Court has restrained the general expressions used by the parties; for it cannot reasonably be supposed, that a valuable consideration would be given for the settlement of an estate, which as soon as settled the husband might destroy; per Ld. Harcourt. Wms's Rep. 145. Pasch. 1711. in the case of Bale v. Coleman.

Abr. Equ. Cases 392. pl. 3. S. C. according-ly, and that the Master of the Rolls 2. A trust was limited to *A. and the heirs of his body, with remainders over.* A bill was brought to have the trustees convey to him in fee. The master of the Rolls decreed them to convey only an estate tail, and refused to decree a conveyance in fee. 2 Vern. 428. pl. 389. Hill. 1701. Saunders v. Nevill.

would not decree the conveyance to be in fee, though pressed to it; and he said, that there may be many reasons why a court of equity would not decree a conveyance at all in such a case, sometimes for a politick reason, as if it were to enable a nobleman to suffer a recovery, and leave the honour bare without estate; or if the party were a notorious spendthrift; or when the estate tail was only by implication, as he said he took it in Sir Francis Garrard's Case.

Abr. Equ. Cases 392. pl. 3. in the case of Saunders v. Nevil, cites Sir Francis Garrard's Case exactly S. P. and seems to mean it to be the S. C. and adds a note at the end, that though the Court would not decree a conveyance in Sir Francis Garrard's

3. So where after an estate tail a remainder was limited to a charity, Ld. Jefferies refused to decree a conveyance in fee. 2 Vern. 428. cites it as the case of Cook v. Woodward.

Garrard's Case, yet he suffered a recovery as cestui que trust in tail; which was held good, and the estate enjoyed under it discharged of the charity.

4. An estate was devised in trust to convey one moiety for 99 years to A. in case he should so long live, with several remainders over. The Court decreed the master to settle the conveyance according to the letter of the will; but upon exceptions taken to the master's report, Nov. 19, 1709. it was ordered, that proper estates should be made to support the remainders, that the testator's intent might not be frustrated. And this was affirmed in the House of Lords. Arg. Cases in Chan. in Ld. Talbot's Time 8. cites it as a case concerning Sir John Maynard's will. Earl of Stamford v. Sir John Hobart.

S. C. cited by Ld. C. Talbot; who said, it appeared that for want of trustees to preserve the contingent remainders, all the uses intended in the will and in

the act of parliament to take effect might have been avoided; and therefore the Lord Cowper did, notwithstanding the words of the act, upon great deliberation, insert trustees. Ibid. 12. cites it as Dec. 19, 1709.

5. Devise of lands to A. & B. in trust for C. for life, with power to make leases, and after C's decease in trust for the heirs male of the body of C. Cowper C. decreed only an estate for life to be conveyed to C. and to his 1st, &c. sons in tail male; but Harcourt K. reversed that decree, and decreed an estate tail; though he admitted, that on marriage articles founded on the agreement of parties, the husband in such case might be only tenant for life; but in a will you must take the words as you find them. 2 Vern. 670. Pasch. 1711. Baile v. Coleman.

Wms's Rep. 142. S. C.—Cro. E. 313. Clerk v. Day.

6. A. seised of a good real estate, and also possessed of a considerable personal estate by will in writing, after several legacies, gives and devises all the rest and residue of his real and personal estate to B. and the heirs male of his body, and for want of such issue to the defendant and the heirs male of his body, with like remainders over to several others of the same name, and makes the defendant his executor, and dies. It was insisted, that the intent of the testator appearing to be to *continue the real estate and the lands to be purchased in his name, this Court would order the settlement to be made in such manner that the plaintiff might not have power to defeat the remainders; and therefore that the plaintiff should be only made tenant for life, with remainder to his first and other sons in tail male, and so for the others in remainder: and the attorney-general said, the House of Lords had, in a case lately, made the like provision for the benefit of the issue; that they may not be defeated by the father. But my lord chancellor said, it was in a case of marriage *articles, where the intent was plain to provide for the issue of the marriage; but here the testator himself has expressly given it to the plaintiff in tail male; and therefore he thought this Court could not vary the limitation; besides that the defendant has a chance for the remainder if the plaintiff should die without issue before any recovery suffered; and mentioned a case where such remainder took place by the death of tenant in tail without issue, before he could compleat a recovery; and therefore ordered a settlement in this case to be made in the like manner, and the deeds and

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G. Equ. R. 105. S. P.—Wms's Rep. 290. S. C. takes no notice of any real estate, but that A. devised all his money in the government funds to be laid out in a purchase of 3 or 400l. a year lands and settled on his eldest son as here, remainder to his 2d son as here.

Ld. Chancellor said, that in marriage articles the children are considered as purchasers; but in the case of a

will (as this was) where the testator expresses his intent to give an estate tail, a court of equity ought not to abridge the bounty directed by the testator; but A. having bequeathed the rest of his personal estate to B. and the heirs male of his body, remainder over; his lordship held it clear, that the personal estate could not be entailed but that the whole property vested in B. but said, as to the other devise he would construe it in the most liberal sense; and it being directed, that lands of 3 or 400l. a year should be purchased, the purchase should be made of 400l. a year.

Ch. Prec. 421. Mich. 1715. Seal v. Seal.
 * S. P. Per Ld. Chancellor. Hill. 1708. Wms's Rep. 106.

But Ibid. 650. in a note, it is said, that by the register's book it appears to be decreed 6 April, 1720, Hubert v. Fe-therston.

7. Ten thousand pound being the portions of the intended husband and wife, was vested in trustees to be laid out in land and settled on the husband for life, remainder to the wife for life, remainder to the 1st, &c. son in tail male, remainder to the husband in fee. The money by consent was laid out in S. S. stock, and improved to 30,000l. The husband and wife having 2 sons brought their bill against the trustees, and the fathers of the husband and wife, and the infant sons to have the stock and the money laid out in land: and in regard of the great increase the husband to have 6000l. to buy a place. It was decreed first by the master of the Rolls, and after by Lord Chancellor Parker, that as the trust must have suffered by the fall, so it ought to have the benefit of the rise of the stock; but that 18,000l. should be taken out of the 30,000l. and that thereout the husband should have 6000l. on quitting his estate for life, and that 12,000l. should be laid out in land to be on the first son of the marriage in tail in possession; but to prevent the son's suffering a recovery on his coming of age, and so to bar his brother in his father's lifetime, and also the father's remainder in fee, the lands were directed to be limited to the father for life, remainder to the first, &c. son of the marriage; and the father to make a lease for 99 years, if he should so long live, in trust for the immediate benefit of the eldest son. And the residue of the money (supposed to be 12,000l. more) to arise by sale of the stock, was directed to be vested in land, and settled on the father for life, &c. according to the agreement. Wms's Rep. 648. Pasch. 1720. Anon.

8. Lands by agreement on marriage, were to be charged with portions for younger children, but the term for years for raising the portions was placed in the settlement subsequent to the estate tail to the first, &c. sons, which was decreed at the Rolls to be transposed; but the father being dead, the eldest son had suffered a recovery of those lands. His honour directed the remainder in fee of those lands subsequent to the term for years, to be limited to the eldest son in fee; but with respect to other lands in jointure, of which no recovery had then been suffered, he directed a new settlement to be made thereof to the sons in tail, subsequent to the term of 500 years, for raising the portions. 2 Wms's Rep. 151. Trin. 1723. Uvedale v. Halfpenny.

[362] 9. A. on treaty of a marriage between C. his eldest son then living, (B. an elder son being dead, leaving two daughters) and M. in consideration of the marriage and portion, articulated to convey the same, to secure 60l. a year for M. for a jointure, and subject thereto to C. for life, remainder to his 1st, &c. son by that marriage in tail male, then with a provision to raise pecuniary portions for

10 Mod. 533.
 8 C.

for daughters of that marriage, remainder to *D. a grandson of A. by another son deceased, and his heirs male*, remainder to *E. grandson of A. by A's eldest daughter and his heirs male*, remainder to *A's right heirs*. All the precedent estates being determined, E. brought his bill for a conveyance of the premises, pursuant to the articles, and Lord C. Macclesfield holding that the consideration might well extend to the after-remainders, by reason of *several and distinct interests in A. and C. at the time of settling the lands, as above*, said that because the limitation by the articles is to C. for life, remainder to his first, &c. son in tail male, though the limitation to E. the plaintiff be to him and his heirs male, which might seem to have been designedly distinguished by the parties from the former limitation, yet it *being in case of articles, where a latitude is given to a court of equity to expound the same*, he would construe it to be intended to E. the plaintiff, and his sons in tail male; so that the premises should be conveyed to him for life, but it should be sans waste, with power to make such leases as tenant in tail may, with trustees to support contingent remainders, the remainder to his first, &c. son in tail male, with like remainders to the next, remainder to the right heirs of A. the defendants. 2 Wms's Rep. 245, 257. Mich. 1724. Osgood v. Strode.

10. By marriage articles the *wife's estate was to be settled on the husband and wife, and on the heirs of their two bodies to be begotten; and afterwards it was settled to the use of the husband and wife during their lives, remainder to the first and every other son of the husband in tail male, remainder to the heirs of the body of the wife, [*by her said husband. They had no son, and but one daughter; the husband died, and his widow married again, and then the husband and wife joined in a fine, and settled the estate to other uses; thereupon the daughter exhibited her bill, and prayed relief on the articles, because by the equity thereof the husband and wife ought to be but tenants for life, and the subsequent settlement could not enlarge the estate of the wife to an estate tail general, (viz.) to her and the heirs of her body; but she had no relief, the Lord Chancellor Cowper declaring he could not relieve against the settlement, though if it rested on the articles without any settlement made, he would have decreed that the articles should be carried into execution, 9 Mod. 131. Hill. 11 Geo. in Canc. in case of Reeves v. Reeves, cites it as the case of Burton v. Hastings.*

S. C. G. Equ. Rep. 113. accordingly, and has those words *viz. [by her said husband,] and says it was insisted, that by the settlement care was taken of the sons, pursuant to the intent of the articles; but no care was taken of the daughters, in regard to the limitation to the

heirs of the body of the mother by the first husband, made her tenant in tail general, and consequently at liberty to defeat her daughter's, as she has now done by this fine and recovery, which was contrary to the intent of the articles, which were to make an effectual provision for all the issue of that marriage. But my lord chancellor said, if no settlement had been made, and they had then come hither to have enforced the making of one pursuant to the articles, there this Court would have taken care the daughters should have been likewise secured of the provision intended by the articles, by limiting a remainder to the daughters, and the heirs of their bodies to be begotten, on failure of sons; but here a settlement being actually made, and accepted by the parties, though a provision be for the sons stricter than the articles themselves imported, yet the next remainder being limited in the very terms of the articles, he could now make no alteration in it, though Mr. Vernon offered a difference where a settlement was made before marriage, and where after, that where it was before, this court could not interpose as they could where it was after marriage, yet the Court had no regard to this distinction, but † too hastily dismissed the bill. — Abr. Equ. Cases 393. pl. 4. S. C. and almost in the words of G. Equ. Rep. 113, but the words († Too hastily) are not there.

11. An estate was given [but whether by will or deed is not expressly mentioned] *to be settled on his grandchild for her life, remainder to the issue of her body*; and when she applied to have an estate tail conveyed to her, she was decreed an estate for life only. Arg. Cases in Chanc. in Ld. Talbot's Time. 8. cites it as a case heard at the Rolls in June 1728. *Brampston v. Kinafton*.

12. A. had a great granddaughter B. and a great grandson C. and devised lands to *W. R. and W. S. their heirs and assigns in trust to receive the rents, &c. till B. shall marry or die, and to pay her 100l. a year for her maintenance, and with the residue to pay his debts and legacies; and after in trust for B. And upon further trust, that if she marry a Protestant of the church of England, and she be then 21, or if under 21, such marriage be with consent of W. R. then to convey the estate with all convenient speed to the use of B. for life without impeachment of waste, voluntary waste in houses only excepted; remainder after her death to her husband for life, remainder to the issue of her body, with several remainders over.* But if she married not as by the will directed, then to convey to trustees, as to one moiety, to the use of B. for life, remainder to trustees for preserving contingent remainders, remainder to her first, &c. son, &c. and the other moiety in like manner to C. A. died; B. soon after attained her age of 21, and above 6 years afterwards applied to the trustees (she being then upon a treaty of marriage, but not actually married) for a conveyance of the estate to herself for life, remainder to her intended husband for life, remainder to the issue of her body. One trustee executed such conveyance, but the other refused. As to this, Lord C. Talbot said, that the trustee who executed the conveyance had done wrong; for nothing was to vest till after her marrying a Protestant; and therefore the trustee, by conveying and enabling B. to suffer a common recovery (as she has actually done) has done wrong. As to the question, what estate B. shall take? Lord C. Talbot said, that considering it a *legal devise executed*, it is plain that the first limitation, with the *power* [of impeachment of waste] and *restriction* [of voluntary waste in houses excepted] carry an estate for life only; so likewise of the remainder to the husband. But as to the following words (*remainder to the issue of her body*) the word (issue) does *ex vi termini* comprehend all the issue, but sometimes a testator may not intend it in so large a sense as where there are children alive, &c. that it may be a *word of purchase*, is clear from the case of *BACKHOUSE v. WELLS*, and of *limitation* by that of *KING v. MELLING*, but it has not, nor can be proved that it may be both in the same will. The word (*heirs*) is naturally a word of limitation, and when by adding some other words, expressing the testator's intent, it may be looked on as a word both of limitation and purchase in the same will; whereas should the word (issue) be looked on as both in the same will, what a confusion would it breed! for the moment any issue was born, or any issue of that issue, they would all take. The question then will be, *whether A. intended B's issue to take by descent or purchase?* If by purchase they can take but
for

for life, and so every issue of that issue will take for life. This inconvenience was the reason that Lord Hale, in KING AND MELLING's case, was of opinion that the limitation there created an estate tail. Restraint from waste has been annexed to estates for life, which have afterwards been construed to be estates tail. Where an express estate tail is devised, the annexing a *power inconsistent with the estate tail, will not defeat it, but the power shall be void*. Here the power is annexed to the estate for life which B. took first; and therefore his lordship was rather inclined to think it stronger than King and Melling's case, where there was no *mediate estate*, as here is, to the husband: that was an *immediate devise*, this a *mediate* one; and so the applying this power to the estate for life, carries no incongruity with it, and therefore was inclinable to think it an estate tail, as it would be at law. But as to the question, *how far the testator's intent is to prevail over the strength and legal signification of the words?* Lord C. Talbot thought that in cases of *trusts executed, or immediate devises*, the construction of the courts of law and equity ought to be the same; for there the testator doth not suppose any other conveyance will be made; but in *trusts executory* he leaves somewhat to be done, viz. to be executed in a more careful and accurate manner. And said that the case of LEONARD v. THE EARL OF SUSSEX, if it had been by act executed, would have been an estate tail, and the restraint had been void; but being an executory trust, the Court decreed according to the intent, as expressed in the will, which must govern the construction in the present case, and therefore ordered an estate for life only to B. remainder to her husband (she being married to the plaintiff, a Protestant) for life, remainder to their first and every other son, remainder to daughters. Cases in Equity in Lord Talbot's Time. 3 to 21. Mich. 1733. *Ld. Glenorchy v. Bosville*.

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(B) Settlements. By Persons of Weak Understanding.

1. **A.** BEING a person of weak capacity, after marriage with M. the daughter of B. settled part of his estate to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to the use of C. (the wife's brother) and his heirs and settled other part to trustees for 200 years, for payment of any money A. (the plaintiff) should charge it withal, by way of legacies or otherwise; remainder to D. (another brother of A's wife) and to his heirs for ever; but B. (the defendant) got a grant from A. of the power which he had to charge the estate, and A's mother in law got another grant from him of 100l. to be paid to her after the death of M. which was recited to be in consideration of the love and affection he had for his wife, who was her daughter; and they got another bond of him of 80l. conditioned for payment of 40l. without any manner of consideration: the question was,

was, whether this settlement should be set aside for want of capacity in the plaintiff, or as a voluntary settlement, A. having on a 2d marriage made a settlement of the same estate on his 2d wife? The plaintiff's father, who had the legal estate by the 2d settlement, not being made a party to the bill, the plaintiff could have no decree, but had leave to amend his bill, &c. 9 Mod. 80. Hill. 10 Geo. Hobson v. Stanecr.

(C) *Uses in Settlements relieved against in Equity.*

1. **I**F *A. sells land to B. for 20l. with confidence that it shall be to the use of A.* yet A. shall have no remedy here, because the bargain hath a consideration in itself, cites D. 169. per Harper; and such a consideration in an indenture of bargain and sale, seems not to be examinable, except fraud be objected, because it is an estoppel. Cary's Rep. 19. Anon.

[365] 2. *A termor for years by settlement on marriage assigns it to trustees in trust for himself for life, remainder to his wife for life, remainder of one moiety to the heirs of the body of the wife by the husband, remainder, as to the other moiety, to the children of the body of the wife.* The husband died, leaving a son of that marriage; the wife married again, and had a son by the 2d husband. Decreed that the son of the 2d marriage shall not come in for a share of the 2d moiety, notwithstanding the words are so; for that it being the first husband's estate, and the settlement to the purposes before-mentioned being made on his marriage, the declaration of the trust for the benefit of *the children of the wife*, must be intended *the children of that marriage*; and so dismissed the bill. 2 Vern. 362. Trin. 1699. Dafforn v. Goodman and Bolt.

For more of Settlements in general, See Agreements, Marriage, Uses, and other proper Titles.

Settlement of the Poor.

(A) By Birth, and Orders relating thereto.

2 Shaw's
Pract. Just.
94. cites
S. C.—
S. P. Just.
Case Law,

1. **H.** *A travelling woman having a small sucking child upon her, is apprehended for felony, and sent to goal, and is after arraigned and banged; this child is to be sent to the place of its birth, if it can be known; otherwise it must be sent to the town where*

where the mother was apprehended, because that town ought not to have sent the child to gaol (being no malefactor.) Dalt. Just. cap. 72. cites it as so delivered by Sir Nicholas Hide at Cambridge Lent Assises, 3 Car.

238. — Shaw's Parish Law 192, 230. cites S. C.

2. Children born in common gaols, and houses of correction, their parents being prisoners, are to be maintained at the charge of the county. Dalt. Just. cap. 73. cites Resol. 32.

3. One Dorothy C. with a young child, going about as a wanderer, came to the vill of A. in the county of W. and desired a warrant to be conveyed to E. in the county of S. where she had some friends, and where the child was born, as appeared by a certificate; upon which the constable of A. made a pass to convey her to E and delivered her to the constable of R. who delivered her to the constable of B. in the county of W. and there at B. the mother died; they sent the child to R. and R. sent it to A. who sent it back again to R. And upon a reference to the judges of assise, Jones and Whitlock J. resolved that the child ought to be kept by the parish where it was born, and not where the mother died in transitu. 2 Bulst. 351. 28 June 5 Car. Anon.

So where one Elizabeth B. a wanderer, with 3 children born in 3 several parishes, came with them to D. in the parish of S. in the county of W. to her sister, and there died, the 3 children being there left, Jones and Whitlock J. resolved that they should be kept and provided for by the several parishes where they were born; and the reason of their resolutions was, because the place of birth is a settlement certain for these children, and the wandering of the mother, with them afterwards, does not alter the case, nor the dying of the mother in a parish having the children there, shall not be said a settling to make the said parish where the mother died, keep the children. Ibid. — The reporter adds a note, that the children were sent to the several parishes of their births, as poor, and not as wanderers, rogues, or vagabonds. Ibid. 352. — Shaw's Parish Law 230, 236. cites S. C.

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4. H. was settled at Luckington in Wilts, but afterwards he and his wife came into the parish of St. Austin in Bristol, where he lived some time, and had a child born there, which child was now under the age of 7 years; H. went to sea, and there died, the mother returned to Luckington, and there she died; two justices made an order to send the child to Luckington, that being the place where the father was settled, which order was confirmed on an appeal; but it was moved to quash this order of sessions, because the child must be sent to the place where it was born, unless it can be sent to the parents where they are settled, which could not be done in this case, because they were both dead. 3 Salk. 257. Luckington Parish v. St. Austin's Parish.

S. C. but it does not appear there that the mother was dead, but only that the father died in the king's service. And Holt Ch. J. said the death of the father does not alter the

child's settlement; and asked if a posthumous child must become a vagrant? birth gives no settlement (as if a child were born in the house of correction) indeed it is a settlement for a bastard-child, because he is nullius filius; the mother must be settled where the father was last settled: so for the child; but *hæsitavit*, and said that the case is considerable, and that the child might be sent to the mother, but *quære* who shall maintain it. But Holt said that they would advise upon the case, and that he would hear it when he came to Bristol upon the circuit. Comb. 380, 381. Trin. 8 W. 3. B. R. S. C. by name of the King v. the Inhabitants of Luckington. — Poor's Settlements 251. pl. 290. cites S. C.

5. B. had two children, both born in the parish of Whitechapel; B. died, and the mother married again, and not long after the husband and wife ran away, and deserted these children who were afterwards privately dropped in the parish of Stepney, one being 2 years old, and the other 4. Whereupon the children were by order of

Poor's Settlements 199. pl. 242. cites S. C. — Shaw's Parish Law 235. cite

S. C. — two justices removed to Whitechapel; but that order was vacated upon appeal, and the reason expressed in the order of sessions was, because Stepney could not prove that B. the father of the children was ever legally settled in Whitechapel, though in the same order it was acknowledged by express words, that both the children were born in Whitechapel. And it was moved to quash this order of sessions, which was done per Cur. and the order of the two justices confirmed; because *where the parent is a *vagabond, the birth of a legitimate child gains a settlement*, otherwise it will be born a vagrant. Carth. 433. Mich. 9 W. 3. B. R. Whitechapel Parish v. Stepney Parish.

B. R. The Inhabitants of Cripplegate v. St. Saviour's, Southwark.

* Vagabonds are to be sent and settled at the place of their birth, or last habitation. Just. Case Law 299. cites Black 246.

* But where the father's place of last legal settlement is not known, there the child may 6. It was agreed by all, that the birth of a bastard child gains a settlement for that child, but a **legitimate child gains no settlement by its birth, when the place of the parent's last settlement is known*, but that such child must follow the settlement of the parent. Carth. 434. Mich. 9 W. 3. B. R. in case of † Whitechapel parish v. Stepney parish.

be sent to the place of its birth, as well as an illegitimate one. 2 Black. 298. The Parish of Rickmansworth in Com. Hertford, and St. Giles's in Com. Middlesex. — S. P. Arg. 2 Black. 292. Mich. 5 Ann. in case of Great Sancke, Barton, and Clifton, Parishes. — S. P. Per Cur. Foley's Poor Laws 265, 266. Hill. 8 Ann. B. R. The Inhabitants of Cripplegate v. St. Saviour's, Southwark. — S. P. And therefore the *child of a man who was born in Ireland, and never gained any settlement in England*, must be settled in the parish where the child was born. MS. Cases, Hill. 8 Ann. B. R. The Queen v. the Inhabitants of Shillingford. — S. P. MS. Cases, Mich. 8 Ann. B. R. The Queen v. St. Giles and St. Saviour's. And Sir Edward Northey cited a case, 10 W. 3. where it was resolved that if the father had gained no settlement since his birth, then the child must be sent to the place where it was born.

Birth gains no settlement but where the *settlement of the father is unknown*. Per Fortescue J. Poor's Settlements 111. pl. 149. in case of St. Giles in Reading v. Eversley Blackwater. — S. P. Just. Case Law 298. — S. P. Shaw's Parish Law 237.

* † Poor's Settlements 199. pl. 242. cites S. C. — Shaw's Parish Law 235. cites S. C. — S. P. Just. Case 237.

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Poor's Settlements 147. pl. 192. cites S. C. — S. P. 7. A woman big with child was removed by order of two justices, from A. to B. and was there brought to bed; B. appealed, and on the appeal the woman was sent back to A. And per Cur. So ought the child; for *all was suspended by the appeal*, and now the mother's right of settling upon B. is avoided ab initio. 1 Salk. 121. Mich. 10 W. 3. B. R. Wood's case.

Shaw's Parish Law 227. cites S. C. — S. P. Per Sir R. Raymond; for the parish was concluded by the order while it was in force, and was not capable of sending her before. Poor's Settlements 42. pl. 66. Pasch. 1711. in Jane Grey's case. — S. P. Poor's Settlements 40. pl. 65. Pasch. 1712. The Parish of Abinger v. St. Martha in Surry.

S. P. Per Cur. Foley's Poor Laws 265. Hill. 8 Ann. in case of the Inhabitants of Cripplegate v. St. Saviour's, Southwark. — Birth is a settlement, and the first settlement, and there must be another second settlement by 40 days, &c. to alter the primary settlement; per Holt Ch. J. 2 Salk. 528. Trin. 1 Ann. B. R. in case of Cumner Parish v. Milton Parish. — Poor's Settlements 240. pl. 281. cites S. C.

8. The place of a child's birth is the place of his settlement, till the contrary appears; per Cur. 12 Mod. 383. Pasch. 12 W. 3. B. R. in the case of the Inhabitants of Spittlefields v. the Parish of St. Andrew.

The child is settled by birth only where it is an *accidental settlement*. Per Holt Ch. J. 2 Salk. 529. in case of Cumner Parish v. Milton Parish.

Settlement by birth is *only quousque they find the father's settlement*; and if they never can find that, it is absolute upon them. Foley's Poor Laws 265, 266. Hill. 8 Ann. B. R. The Inhabitants of Cripplegate v. St. Saviour's, Southwark.——S. P. MS. Cases Hill. 8 Ann. B. R. The Queen v. the Inhabitants of Shillingford.——S. P. But if neither the father's settlement, nor the place of the child's birth can be known, then it is a misfortune upon the parish where the child is found. MS. Cases Mich. 8 Ann. B. R. The Queen v. St. Giles and St. Saviour's.

9. J. S. an *infant born in the parish of St. Andrew's, was nursed in Spittlefields, the father died, and the mother ran away, neither the father nor the mother had any settlement in St. Andrew's, but were only lodgers there.* This child being become likely to be chargeable to the parish of Spittlefields, was removed by order of two justices to the parish of St. Andrew's, being the place of its birth. Upon appeal from the said order to the quarter sessions it was quashed, the justices being of opinion, that bastards did not gain a settlement by their birth; and upon motion in B. R. this order was quashed, and the order of the two justices confirmed; because a child ought to be maintained where it is born, unless it obtains another settlement; and therefore it is *incumbent upon the parish where it is born to find another place of settlement.* Ld. Raym. Rep. 567. Pasch. 12 W. 3. Spittlefield's Hamlet v. St. Andrew's Parish, Holborn.

10. If a *man and his wife come to A. and then go to the parish of B. and within 40 days the wife is delivered of a child,* the child, though legitimate, shall be settled where it was born; per Holt Ch. J. 2 Salk. 529. Trin. 1 Ann. B. R. in case of Cumner Parish v. Milton Parish. Poor's Settlements 241. pl. 281 cites S. C.

11. If the *father is settled, and dies, his wife being big with child, and after the mother dies before she is delivered, and afterwards the child is born,* the child is settled there by his birth; per Holt Ch. J. 2 Salk. 529. in case of Cumner Parish v. Milton Parish. 6 Mod. 87. S. C.

12. A *man inhabiting and settled in a parish had several children born there, and then removed into another parish, and rented a tenement of above 10l. per Ann. and then failed in the world, his children being above seven years old; and the question was, which parish they should be settled in, whether in the first parish where they were born, or in the last parish where their father had acquired a settlement.* My Lord Ch. J. was of opinion, that they should be settled in the first parish, but Powel e contra; so it was adjourned till the next term. Freem. Rep. 518. pl. 693. Mich. 1702. B. R. Anon.

13. An *order to remove the child of a vagrant woman (being dropt in a parish) to the place of its birth* was confirmed; for that is the child's settlement whether legitimate or illegitimate. MS. Cases. Hill. 8 Ann. B. R. The Queen v. the Inhabitants of Shillingford. [368]

14. Ann Smith a *child of a year old was intruded into the parish of St. John Baptist, but born in Spaldin.* It was said, a child gains no settlement by being born in a place, unless he is a bastard, or his father and mother vagabonds. Ld. Parker said, you say well; but here it is *made good by the subsequent words, being last settled there.* S. P. For this being adjudged the place of their last settlement all circum-

ances to
make it so
shall be un-
derstood, and

the children born under such circumstances will gain a settlement. MS. Cases Mich. 10 Ann. B. R. S. C. by name of the Queen v. the Inhabitants of St. John Baptist in Peterborough, and Spaldin in Lincolnshire.

there. Poor's Settlements 6. pl. 9. Pasch. 1711. B. R. The Parish of St. John Baptist in Peterborough v. Spaldin in Lincolnshire.

15. A poor child born of a travelling vagrant woman in the parish of Alderbury, whose parents were unknown, was brought into the parish of St. Edmond's, who removed him to Alderbury. The sessions quashed the order for form, which order was removed into B. R. It was objected that the *order of removal does not judge that he is chargeable, but only in the reciting part*, but it was answered, that there is no occasion; for the thing speaks itself, and it is impossible it should be otherwise, the child being but four or five days old, and the parents unknown. Per Cur. there *must be an adjudication*; for possibly a person out of charity may relieve him. The order of sessions was confirmed. Poor's Settlements 90. pl. 122. Trin. 1719. B. R. Aldermanbury v. St. Edmond's in Sarum.

See (H) pl. 6.

(B) By Fraud, and How punished.

1. **T**HE parishioners of L. gave a man (who had a wife and 5 children) 5l. in money to remove into another parish, upon condition that if he returned in 40 days, he should repay the money, he removed accordingly, and stayed away by the space of 40 days. The Court declared their opinion, that the man had gained a settlement in the parish to which he removed; for being an inhabitant there for so long a time as was required by law to make a settlement, and not disturbed by the officers, they were remiss in their duty, and the Court would not help their negligence. 3 Mod. 67. Pasch. 1 Jac. 2. B. R. David Burgh's case.

If there be
any fraud in
conveying a
woman with
child to bear
her child in
any parish,
yet the child

2. If a woman be settled in a parish, and got with child of a bastard, and persuaded, when near her delivery, to remove into another parish, and there is delivered, it is good reason for the justices to return her, but that must be to the place of her last settlement, (with her child, come semble.' Comb. 360. Hill. 8 W. 3, B. R. The King v. the Inhabitants of Moreton.

may be sent with its mother, to the place of the last settlement; per Holt Ch. J. Cumb. 286. Trin. 6 W. & M. B. R. Ann Fienceley's Case.—Poor's Settlements 151. pl. 200. cites S. C.—Shaw's Parish Law 227. cites S. C.

3. Giving money to a man to marry a poor helpless woman, on purpose to gain a settlement for her in the parish of A. where the man was settled, is *indictable*; but it should be set forth that the woman was likely to be chargeable, and that she was last legally settled in the parish of B. But saying that she was an inhabitant there is not sufficient. 8 Mod. 320. Mich. 11 Geo. B. R. The King v. Edwards & al.

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4. Conspiracy to let lands of 10l. per ann. value to a poor man in order

order to get him a settlement, or to *make a certificate-man a parish officer*, or to send a woman big of a bastard child into another parish to be delivered there, and so to charge the parish with the child are crimes *indictable*. Per Cur. 8 Mod. 321. Mich. 11 Geo. B. R. in Case of King v. Edwards.

5. There was a special order stated at sessions, A. *purchases a copyhold* tenement, in St. Paul's Walden, *which*, with the fine and fines paid the court, *amounted to 30l.* and it appeared by the same order, that the *officers of the parish of Kempton had given him 40s. towards paying his fine and fees*; therefore it was insisted, that this was fraudulent, and not a good purchase within the statute of 9 Geo. sufficient to gain a settlement. The whole Court said, that they *could not take notice of its being fraudulent, unless the justices had * adjudged it so*. So the order was confirmed. Foley's Poor Laws 238, 239. Pasch. 13 Geo. B. R. between the Parishes of Paul's Walden and Kempton Com'. Hertford.

fraud, and B. R. cannot judge of it. Per Pratt J. 10 Mod. 393. Trin. 3 Geo. 1. in Horton Parishes case. * It belongs to the justices of peace to judge of

6. If any shall by any indirect means *hinder a poor man from hiring a house*, he may for such disturbance be indicted. And it is finable to remove or *put any out of the parish who ought not to be put out*, and the persons so removed may be sent back. 2 Shaw's Pract. Just. 52.

(C) By Habitation.

See (B)

1. **S**ETTLEMENT by commoracy is where a person continues in some other place than where he was before legally settled, and such continuation makes a settlement. 2 Shaw's Pract. Just. 51.

2. It was held that if a man *lives in H. for a good time, and then goes to G. and there falls so sick, that he is not capable of being removed back to H.* though he lies in that condition for many days, this shall acquire no settlement. Freem. Rep. 433. pl. 581. Trin. 1676. Anon.

3. A man, his wife, and family removed into a new parish, the minister, church-wardens, and inhabitants of the old parish certified that they own them and all the children, which should be born of them as their parishioners. Nineteen years after, 2 justices made an order to remove them to the old parish with 7 children born since, reciting the certificate, &c. This order was confirmed at the sessions, and now both these orders were quashed; for per Cur. they have obtained a settlement in the new parish. See now the late * statute. Comb. 292, 293. Mich. 6 W. & M. B. R. Anon.

Poor's Settlements 192. pl. 237. cites S. C.—

* See Certificate man.

4. On a certiorari was returned an order of sessions in Gloucestershire. A girl of near 13 years old had been at D. in the said county, and had always lived there with her grandmother, but her father was legally settled at B. in the same county; she wanting relief, was by the order charged on B. because her father was settled

Poor's Settlements 258. pl. 289. cites S. C.—Dalt. Just. cap. 73. cites S. C.

tled there. And per Cur. the order must be quashed; for though till 8 years children are counted nurse-children, yet they must afterwards have maintenance from the parishes where they themselves are settled, and *for any thing appears, she may have gained a settlement.* 2 Salk. 470. Pasch. 7 W. 3. B. R. The Inhabitants of Dumbleton v. the Inhabitants of Beckford.

[370] 5. A *clandestine habitation* gains no settlement, though the party lived 6 years in the parish. Per Holt Ch. J. Comb. 382. Trin. 8 W. 3. B. R. Anon.

Poor's Settlements
240 pl. 28.
cites S. C.
* S. P. 12
Mod. 383.
Pasch. 12

6. If a *child be put out to * nurse or for education, though it be above 7 years old, it gains no settlement thereby, as it was held in Sir PAUL JENKINSON's case.* Per Holt Ch. J. 2 Salk. 528. Trin. 1 Ann. B. R. in the case of Cumner Parish v. Milton Parish.

W. 3. B. R. in the case of the Inhabitants of Spittlefields v. the Parish v. St. Andrews.—*Boarding as a scholar* gains no settlement. 2 Salk. 524. Hill. 8 W. 3. B. R. Ryship Parish v. Harrow Parish.—Poor's Settlements 224. pl. 268. cites S. C. by name of Riceflip v. Harrow.

7. *Bagnal and his wife, and their daughter about 20 years of age, came by certificate from the parish of Biddulph to the parish of Woolstanton, where the said Bagnall rented a house of one Tho. Cartledge, at the yearly rent of 45s. and 4 years after he rented a mill in the parish of Burslem, of one Thomas Bagnall, of the yearly rent of 11l. He held both the house and mill for 3 years together, and paid the rent for both.* The question was, whether he and his family, inhabiting all the time in the house at Woolstanton, did not gain a settlement there. Probyn J. was of opinion he did not; for the *act of the 9th and 10th W. 3. was an explanatory act, and ought to be taken strictly; and that the words in such parish, relating as much to the taking of a tenement of 10l. as serving of an annual office; and this tenement of 11l. a year not being in Woolstanton, he took it that Bagnall gained no settlement there. Foley's Poor Laws. 210, 211. The case between the Parishes of Woolstanton and Biddulph.

* See Certificate-man

8. It was resolved in B. R. that if a *man has two settlements he is to be esteemed as settled where he lives; and though it is at his election to settle at each place, yet it is not in the power of the justices to remove him from the place where he lives, and has a right of settlement, to another place where he has likewise a right of settlement.* 10 Mod. 388. Trin. 3 Geo. 1. B. R. in the case of South Sidenham v. Lamerton.

9. In case of 2 leets the party shall be a *resiant where he lodges, let him perform his service in which he will.* MS. Cases, Trin. 3 Geo. B. R. Anon.

Shaw's Parish Law
235. cites
S. C.

10. Settlement of a poor man is in the parish where he *lodges, and not where he works, and a man cannot be removed from his work, as a cobbler from his stall.* 8 Mod. 308. Mich. 11 Geo. B. R. The King v. Spittlefields Hamlet.

11. A *house stands in 2 parishes, the servant's lodging-room is in the parish of B. and the part of the house in which he does his service is in the parish of C. The settlement shall be adjudged from the lodging and not from the service.* Per Fortescue Serjeant,

jeant, Arg. at Winchester Assises in Lent, 1727. said it had been so adjudged.

12. The 40 days continuance gives a settlement in all cases where the person cannot be removed by the justices, as in case of renting 10l. a year, or living in his own, except where the purchase of an habitation is under the value of 30l. 2 Shaw's Pract. Just. 58.

(D) By Having, &c. Land or House, &c. See (B)

1. 13 and 14 **U**PON complaint made by the churchwardens and * [371]
Car. 2. 12. **U**verseers of the poor to a justice of peace within An order of
40 days after any person's coming to settle in any tenement under the quarter-
yearly value of 10l. who is likely to become chargeable to their parish, sessions was
it shall be lawful for any 2 justices of peace, quor' unus of the divi- removed by
sion, to remove and convey such person to the parish where he was last certiorari;
legally settled, either as a native, housekeeper, * sojourner, apprentice, upon which
or servant, for 40 days at least, unless he give security to indemnify the question
the parish, to be allowed by the said justices. was, whe-
ther 10l.
per annum
mentioned
in this act
for the set-
tlement of a
poor man,

Provided that all persons who are aggrieved by the judgment of such two justices, may appeal to the next quarter-sessions, who are required to do them justice.

shall be understood 10l. per annum of an estate of freehold and inheritance, or 10l. rent as a tenant; and it was urged that it is unreasonable to intend that the act would remove a person from his freehold, though under 10l. per annum; and that the statute ought to be understood renting 10l. per annum, and a case was cited to be so ruled by North Ch. J. at the assises at Buckingham; and Holloway said, that he had known it to be so adjudged; but Herbert Ch. J. was of another opinion, and took a man who bought a cottage of 20s. per annum of which he had the inheritance, to be within the words and mischief of the act, if he is like to be chargeable to the parish; for that is the thing against which the statute provides; but where a man is not like to be chargeable to the parish, if he will live in a cottage of 10s. per annum, or otherwise, under his condition, he is not within the meaning of the act; the other justices were silent. Skin. 268. pl. 4. Hill. 2 & 3 Jac. 2. B. R. The King v. the Inhabitants of Stanmore.

It has been resolved that a person coming to reside upon his own estate, though under 10l. was not within this statute, nor removeable within the 40 days, for that neither this nor any other act of parliament did design to debar a man from coming to look after and improve his own estate. And whenever a person comes to his own estate, it was said that such a person was un-removeable, viz. settled. 10 Mod. 431. Pasch. 5 Geo. 1. B. R. in the case of the King v. Burcleer Parish.

2. A. had been long settled at B. and afterwards a copyhold estate for life in a cottage, worth about 40s. a year in S. came to him, which he purchased. It was held, that if A. pleased he might go to his own house, though the value was so small; for the town is not chargeable to maintain him so long as he has any thing of his own; and though the yearly value be but small, yet he may sell it and raise money, if he will; but they all likewise held that the town of B. could not force him thither. And the order that was made to remove him from his own house to B. where he was last settled, was quashed, this appearing to be the case. Freem. Rep. 432. pl. 581. Trin. 1676. The Town of Stanlock v. Bampton in Oxfordshire.

But where a man purchased a copyhold of 15s. per annum, the Court held that unless he have or do rent 10l. per annum, tho' he has 20 or 40s. per annum freehold of his own, yet

if he be chargeable to the parish he may be removed by the statute. 2 Show. 494. Mich. 2. Jac. 2. B. R. The King v. Olmond

So where A. was legally settled in B. and had a child; afterwards some estate descended to A. in C. whither A. removed (as he cannot be hindered) Holt Ch. J. asked if the descent of a rood of land should charge a parish with 10 children, and said he thought they should follow the parent

for nurture and education, but that the parish where born should contribute to their relief. *Cumb. 381. Trin. 8 W 3. B. R.* The King against the Inhabitants of Luckington.

But where a person settled at Harrow as a servant for a year had a copyhold estate of 25s. per annum come to him in Edgeworth, to which he was admitted, and lived in it till his death, and after his wife enjoyed it during her life, and died possessed of it too, on dispute about the children of this party he was held to be settled at Edgeworth; for it being agreed that a person's living in a freehold of a small value would gain a settlement; it will be the same in this case; for the copyhold is in nature of a freehold; and not to be removeable, and to gain a settlement are the same thing; and if one takes a tenement of more than 10l. per annum, and does not live in it for 40 days he cannot be sent thither; but the father continuing upon this copyhold for life for 40 days it gained him a settlement, and consequently it gained one for his children. A settlement is not an inheritance to go by descent, but persons must be sent where they were last legally settled for 40 days. So here they cannot be sent to Harrow, where they never were, after the death of their father, were they not removed during his life. *Quære of an estate for 99 years under 10l per ann. for per Powell living on such an estate for 40 days gains no Settlement. M S. Cases 10 Ann. Harrow v. Edgeworth. — S. C. cited M S. Cases Trin 4 Geo. B. R. in the case of the Inhabitants of Grandborough v. the Inhabitants of Musley as adjudged Pasch. 11 Ann.*

So where a man in 1687 took a lease of a cottage in Musley of the value of 30s. per annum for 99 years, whereupon 18. per annum was reserved, and in 1689 he assigned over his term to J. S. in trust for himself for life, and after his death for her life, and after her death in trust for his son, and charged the son's trust with 10l. to his 2 daughters. The father and mother died; the son married and died; his widow took administration, and sold part of the cottage for 15l. The part not sold, was an upper room, a low room, and a lenetow. A man, whose settlement was at Grandborough married the widow, and went into Musley to dwell in the cottage; whereupon he was removed by order of two justices to Grandborough, which order was confirmed at the quarter sessions, in which last order the case was specially stated, both were removed into B. R. and quashed per Pratt Ch. J. Ch. J. Eyre and Fortescue, who held, that any person who hath an estate of freehold, copyhold, or for years, by act of law, as by descent, marriage, as executor or administrator, or by purchase may dwell upon it as his own, and is not removeable from it; and that if he continues upon it 40 days he thereby gains a settlement, though it be under the value of 10l. per annum; for they held that the 13th and 14th Car. 2. cap. 12. whereby persons occupying [372] land under the yearly value of 10l. are made removeable, is to be understood of persons * that hold land under that value at a full and stretched rent, and that it had been all along so construed, because persons that have land by act of law or by purchase, cannot be supposed to take it for those ill purposes set forth in the preamble of that statute. And two cases were cited and allowed, the first in Trin. 9 W. 3. between Hendon and Rislip, where a freehold of a very small value was adjudged to gain a settlement; and that it was in that case adjudged that a man could not gain a settlement by having a freehold in a parish, unless he abode upon it for 40 days, and that notice in such case is not necessary because the man is not removeable. The other case was Pasch. 11 Ann. between Harrow and Edgeworth. N. B. That in the principal case the wife had an equitable interest as administratrix, and so liable to the debts of the intestate, which was not observed. MS. Cases. Trin. 4 Geo. B. R. The Inhabitants of Grandborough v. the Inhabitants of Musley.

So where a poor person lived in a cottage [in Wyley] for 30 years and upwards, and died leaving a daughter, who afterwards married to one B. who immediately entered, and after sold it for 24l. but before sale the man and his wife continued 3 quarters of a year in quiet possession; and it was likewise laid in the order, that the old man before his death left three guineas to buy a term in the cottage of the Earl Pembroke, the justices at the sessions adjudged him settled at Wyley, and the Court of King's Bench inclined to be of the same opinion, no fraud appearing; though it was objected econtra that there was no title appeared, and it might, for aught appears, be a lease at will. Adjournatur. Poor's Settlements 116. pl. 156. Trin. 1784. B. R. Ashbittle Parish in Somerset v. Wyley Parish in Wilts. — In a MS. which I have of this case, it is said, that it was resolved that the justices had no power to remove them, that it hath been held that where a man lives upon his own estate either freehold, copyhold, or leasehold of never so small a value, it is by construction out of the acts of settlement and justices of the peace are not to determine the poor man's title; yet in this case the daughter after so long a possession had a title against all the world. And if the cottager was at first a disseisor, here was a descent cast, and the daughter's possession, and the descent was a good title, and he that had right is put to his real action. It did not appear in this case that the lord had set up any claim; but it was said that a sum of money had been deposited in the hands of a third person in order to have had some conveyance-title from the lord, but the Court laid no stress upon this. MS. Cases. Mich. 11 Geo. S. C.

So where the question was, whether a man coming into a parish where he has a copyhold messuage of 28s. per year, and living there 2 years gained a settlement? Per tot. Cur. it did, and had been often so ruled. Foley's Poor Laws 264. Mich. 2 Geo. B. R. Watson v. Monkeley.

But where J. B. before his marriage was hired for a year, and served 2 years as a hired servant, according to the statute, in the Parish of Farringdon, and afterwards removed into the Parish of Widworthy and lived there in a cottage of the yearly value of 30s. and worked as a day-labourer for himself, of which his house his father then, and for many years before was possessed for the residue of a term of years determinable on lives, and whereof he died so possessed without a will (his wife dying

dying before him) leaving the said J. B. and another son, who took his share of the father's effects and the said J. B. after the death of his said father lived and continued in possession of the said house for 5 or 6 years until the lease was determined, after which two justices made an order to remove him and his family to Farringdon, and after the making of which order the said J. B. took out letters of administration to his father. Farringdon appealed to the quarter sessions, who being of opinion that J. B. by living in the said cottage had gained a settlement in the Parish of Widworthy, quashed the order of two justices; but upon removing both orders into B. R. The order of sessions was quashed, and the order of the 2 justices confirmed by Page, Probyn, and Chappel J. the chief justice being absent. MS. Cases. Trin. 10 & 11 Geo. 2. Parish of Widworthy v. the Parish of Farringdon.

3. All persons whose *interest in houses or lands is determined*, cannot be put out of the town where they were legally settled, nor can they be sent to the place of their birth or last habitation, but, according as *they are able or impotent, shall be relieved*, or set to work in the town *where so settled*. 2 Shaw's Pract. Just. 51. cites Dalt. 158.

4. The *having land in a parish will not make a settlement, but living in a parish where one has land will gain a settlement without notice*; for the law never intended to banish men from the enjoyment of their own lands, and the law takes notice of freeholders as those that chuse members of parliament and are jurors. Per Holt Ch. J. 2 Salk. 524. Hill. 8 W. 3. B. R. Rysslip Parish v. Harrow Parish.

Nelf. Just. 531. cites S. C. 5 Mod. 416, 417. Mich. 10 W. 3. B. R. S. C. by name of Ricelip v. Henden.—

Poor's Settlements 224. pl. 268. cites S. C. by name of Ricelip v. Harrow.—Just. Case Law 240. cites S. C.—Shaw's Parish Law 228. cites S. C.

If a man has land in a parish, yet if he *does not actually enter upon it*, and continue for some little space of time, he cannot be sent thither by an order; for how can he be said to be settled in a place where he never was! Poor's Settlements 67. pl. 89. in the case of the Parish of Uppoterce v. Dunswell in Devon.

5. If a *lord at this day makes a copyhold*, as it is not good in law. so it will not make a settlement, but *must be taken as a fraud*, MS. Cases, Mich. 10 Ann. Harrow v. Edgeworth.

6. J. S. *possessed of a lease for years died intestate*, and it was held that the *next of kin should not be said in law to be settled there*; for he has only a right which he must pursue by taking out letters of administration, but no right is settled or vested in him till an actual taking out. Poor's Settlements 77. pl. 103. Pasch. 1717. B. R. The Parish of South-Sidnam v. Lamerton.

*[373] Shaw's Parish Law 237. cites S. C.—10 Mod. 389. Trin. 3 Geo. 2. B. R. S. C.

where this question was put; but it being immaterial, by reason that the Court [for another reason] held him settled at Lamerton, they gave no judgment upon it. — But where a *poor woman, as next of kin, was intitled to a leasehold cottage worth about 20s. per ann. her husband took out letters of administration in right of his wife*; and held it gained a settlement. So likewise if he had purchased it, had there been no fraud. Poor's Settlements 85. pl. 114. Gramborough v. Mursley in Bucks.

7. A. H. *came with a certificate into the parish of E. and afterwards married one S. S. and had several children by her*; her father *surrendered a copyhold estate to her of 20s. per ann. and so the husband had it in her right*. And per Cur. The man has gained a settlement in E. For a man cannot be turned out of his own, let it be never so small. 2 Shaw's Pract. Just. 57. cites Pasch. 1719. The Parish of Burclear v. East-Woodhay.

S. P. Just. Case Law 240.—Shaw's Parish Law 233. cites S. C.—Poor's Settlements 88. pl. 125.

S. C. And per Fortescue, the party here *could not be removed*; and not being removeable, and gaining a settlement, are the same thing; and he cited the case of RICELIP v. HARROW, where

half

half an acre of land in his own right gained a settlement. Then it was objected, that the person being a certificate person by the statute of 9 & 10 W. 3. he gains no settlement unless he rents 10l. or exercises an office; and that statute being an explanatory act, it cannot be taken farther than the words are: but the Court thought it *no explanatory act, but a new law*; and therefore every thing that is in the same mischief, though not within the words, is within the meaning of the statute; beside, the act of parliament never designed to put a certificate person in a worse condition than another.——10 Mod. 430. S. C. by name of the King v. the Parish of Buredeer.

8. A person came into a parish, and *married the daughter of a copyholder, who died seised, and the tenement was afterwards blown down, and then the family was removed by an order of two justices, to the parish from whence they came*; the justices at the sessions adjudged them settled in the parish where the copyhold was. It was objected, that it is *not said that the wife had any right in the copyhold, or that the husband lived upon it for 40 days*: and the Court held it ill for that reason; quod nota. Poor's Settlements 102. pl. 137. Pasch. 1722. B. R. Anon.

9. 9 Geo. 1. cap. 7. S. 5. Enacts, that *no person shall acquire any settlement, by virtue of any purchase of an estate whereof the consideration does not amount to 30l. for any longer time than such person shall inhabit in such estate.*

10. The order of sessions stated a matter specially, which was thus, one George Woolmore came into the parish of Benjoy, and *purchased an acre of ground for 25l. and afterwards builds an house on this acre, and lived in it 9 months, and sold it for 150l.* If this gained him a settlement in Benjoy was the question. Raymond Ch. J. said, that before this act of the 9 Geo. a person who had a *tenement, either freehold or copyhold*, might live there, and was not removeable; and if it came *by descent*, it is not now within the act; and he said that he thought that by this person's having a tenement worth 150l. and living in it 40 days, he was not removeable, and therefore gained a settlement. Mr. Justice Page, and Mr. Justice Probyn of the same opinion. Mr. Justice Reynolds said, by the purchase he gained no settlement there; and he did not know an act of parliament that made what was done subsequent sufficient to gain a settlement. Et sic adjournatur. Foley's Poor Laws 239, 240, 241. Mich. & Hill. 2 Geo. 2. in B. R. between the Parishes of St. Mary's in Hertford and the Parish of Benjoy.

[374] 11. N. P. was *born at St. Clear, and lived there till he was of age; afterwards he went to St. Neot's, and contracted to live with a gentleman for 5l. yearly; he lived there with his master a year and a half, and returned to St. Clear, and lived there off and on 3 years upon an estate which he held jointly with his mother and sister, but did not reside there 40 days together.* Two justices removed him into St. Clear, but by an order made at the general quarter-sessions, he was removed to St. Neot's. It was urged at the bar, that here was no settlement gained at St. Clear within any of the acts of parliament, there being no hiring. The Court was of opinion, that the contract was tantamount to a hiring, and implied it. That it depended upon 13 & 14 Car. 2. cap. 30. which required no 40 days continual residence, nor a living upon the identical estate; therefore quashed the order of the sessions, and affirmed

affirmed the private order of the two justices. MS. Cases. Trin. 13 Geo. 2. *The King v. the Inhabitants of St. Neot and St. Clear.*

10. *W. rented an estate of 100l. per ann. in Sowton, where he and his family lived some years, but his landlord having distrained his goods for rent, he left Sowton, and his family, and went to Sidbury, where he had an estate of 19l. 10s. a year in his own right, for some term or terms of years. He lived off and on here a considerable time, but never upon his estate, being a guest at some public alehouse in the same parish, but never resided there 40 days successively, nor had any cattle upon his estate, but sowed some turnips, digged his ditches, and cut down some small quantity of wood from off the hedges. Having left his wife and family at Sowton, occasioned him to go there frequently to see them, where he stayed 2 or 3 days together, but no longer, and returned back to Sidbury. Two justices having removed him to Sidbury, they appealed to the general quarter-sessions, where an order was made to remove him to Sowton. Upon removing these orders into B. R. two questions arose. 1st, If he had this estate by purchase, according to 9 Geo. 1. or by descent. And whether his living in Sidbury, as is mentioned, and not continuing there 40 days together, is sufficient to gain a settlement there? 2dly, If it be, whether or no his family should not follow him? And the Court was of opinion, though the order did not state specially what interest he had in his estate, yet as it mentioned it to be in his own right, and for some term or terms of years, that he had a beneficial interest in it, by surrendering it [as it seems he did] for 8l. to his tenant; and that he was irremovable from Sidbury, notwithstanding he never resided there for 40 days together; for he was above that time there altogether. As to the second question, it was determined in this court in the case of BLACKWATER AND EVERSLEY, that where the children live with their father, and are part of his family, they cannot (though they are not nurse-children) gain a separate settlement from their father, but must all have one and the same settlements. Therefore the Court quashed the order of sessions, and affirmed the private order of 2 justices. MS. Cases. Hill. 12 Geo. 2. *The King v. the Inhabitants of Sowton and Sidbury.**

(E) By Marriage.

See (1)

1. **A** MAID servant was gotten with child at A. by her fellow-servant (or by another young man of the same town) after both their times expired they marry, and then the young man is retained at B. and then the woman is delivered of the child; she with her child are to be sent to the father at B. and there are to be settled. Dalt. Just. cap. 73.

2. A widow having children of the age of 7 years, marries a man of another parish; the children shall go with the mother for nurture, but after 7 years of age they shall be sent back to the parish where the father was settled; for she cannot gain a settlement for them in this last parish, because under coverture, and having

having a settlement there herself only as part of her husband's family, from whom she cannot be severed. Per Powel J. 2 Salk. 528. Parish of Cumner v. Milton.

Poor's Settlements, 186. pl. 230. cites S. C.—
S. P. 2
* 3. *Wherever the husband is settled, there the wife must likewise be settled.* Per Cur. 3 Salk. 256. in the case of the King v. the Inhabitants of Oking.

Shaw's Pract. Just. 52.—The wife ought to be sent to the place where her husband was last legally settled, though such settlement was by his being a servant, &c. Dalt. Just. cap. 73.—
S. P. Shaw's Parish Law, 229.

2 Shaw's Pract. Just. 55. cites S. C.—
S. C. And an order being to remove her to Winsborough-Green as the place of her settle-
4. A woman married a Scotchman who had gained no settlement in England, but she before her marriage was settled in Winsborough. And the Court held, that although a woman by marriage follows the condition of her husband, yet she shall not be put into a worse condition. Her husband is a parishioner no where in England, must she therefore starve? And per Cur. *the settlement which she had in her own right does still continue*, notwithstanding the intermarriage. Poor's Settlements, 22. pl. 31. Mich. 1713. The Parish of Dunsford v. Winsborough-Green.

ment before marriage, exception was taken to it, that she was a married woman, and by her marriage she ought to be settled where her husband was; and this cannot be right; for if the justices may send away a wife, it is making a divorce between husband and wife; and if he is a Scotchman, they ought to send her, as part of his family, to the bordering counties of Scotland, according to the act of 39 Eliz. cap. 4. S. 6. The Court held, though she was a married woman, yet if her husband had no settlement, she could not gain any other settlement than she had before marriage; and as for divorce it was none; for the husband might come to her as well at Winsborough-Green as at Dunsford; and as to the husband, nothing in the order appears as to him, whether in England or not; so the order was by the whole Court confirmed. Foley's Poor Laws, 249, 250, 251. Mich. 12 Ann. B. R. The Parish of Dunsford v. the Parish of Winsborough-Green in Com. Devon.

5. A woman was settled in Dunswell, and after married with a person who was a runnagate, and had gained no settlement, as appeared, any where else; he came into the parish of Uppoterce, and died, and upon his death-bed declared that he was born in Wincanton: two justices sent his wife to Dunswell, where she was settled before the marriage. And per Cur. where it appears that the husband in his life-time has no legal settlement, as can be found, there the marriage shall not put her in a worse condition than she was before, and is all one as the case of a Scotchman, and a foreigner, and she shall not lose her former settlement; and although her husband was born in Wincanton, and may be settled there, yet his wife cannot be settled nor sent thither, she never having been in that place. Poor's Settlements, 66. pl. 89. Mich. 1714. B. R. The Parish of Uppoterce v. Dunswell in Devon.

Nelf. Just. 542. cites Trin. 9 Geo. S. C.—
Dalt. Just. cap. 73. cites S. C. And says that the widow and children
6. Wherever the husband and father had a legal settlement, the widow and children gain a settlement there; so where the father was born in Reading, and afterwards put apprentice in Eversley, where he served 2 years, and then his master breaking, he returned to Reading, where he married, and had children, and then died (pending a contest between the 2 parishes) the widow and children

dren were sent to Eversley. 8 Mod. 169. Trin. 9 Geo. B. R. shall be settled where the husband and their father was settled, and that his death made no alteration in the case; and though the wife had another settlement before she married, yet that was lost by her marriage.

It was held by Pratt Ch. J. Powls, Fortescue, and Raymond J. That though the place of the birth of a poor child, where the father has got no settlement, is the place of the settlement of the child, yet where the father gained a settlement, his children, though born in another parish, shall be looked on as settled at the place of their father's last legal settlement, and shall be removed thither as well after the death of their father, if occasion requires it, as in his life-time, supposing they have gained no settlement of their own. *Ld. Raym. 2 Rep. 1332. S. C.* Poor's Settlements, 110. pl. 149. S. C. adjournatur. The settlement of the husband is the settlement of the wife and child. *Poor's Settlements, 106. pl. 142. Per Cur. in case of the Parish of Oby v. Linsbury.*

7. A man erects a cottage without licence or order on the waste, and lived and died in it. His only child was a daughter; who entered, and married. Per Cur. her being in possession by descent, is a good title against any escheat the lord might have at common-law; and therefore the marriage gives the husband a settlement. 8 Mod. 287. Trin. 10 Geo. The King v. Wilby Parish. Shaw's Parish Law, 223. circa S. C. [376]

8. An order was made by two justices, which recited that a woman settled in the parish of A. had married a man settled in B. but that he had been absent several years, and had not been heard of since, so that it is not known where he is or resides, &c. And then directed the removal of her to her own parish. Upon appeal, the sessions confirmed the order, and now both orders being removed by certiorari, Lee Ch. J. said, it was a settled point, that if a woman, having a settlement, marries a man having none, her settlement is suspended by the coverture; for otherwise the justices would separate, and have in effect a power of divorcing man and wife, which would be unreasonable; therefore it must be set forth that he is dead, in order to revive her settlement: the whole Court being of this opinion, both orders were quashed. Hill. 12 Geo. 2. B. R. The King v. the Inhabitants of Norton.

(F) By Notice. Who must give Notice, and see (K) what amounts to it.

1. 1 Jac. 2. cap. 17. ENACTS, that the 40 days continuance of a poor person in a parish intended by 13 & 14 Car. 2. cap. 2. to make a settlement shall be accounted from the time of his delivery of notice in writing of the house of his abode, and the number of his family, to one of the churchwardens or overseers of the poor of the parish to which they shall remove.

2. P. served his apprenticeship at Malden, where he married, and had several children. His wife died, and he married another woman, who had a term for years in a house in the parish of Heybridge, where he lived for a year. Afterwards he returned to Malden, was rated to the poor, and lived there two years, and then died. Soon after his wife and children were removed to Heybridge by two justices, but upon an appeal they were by an order of sessions declared to be inhabitants of Malden. Mr. Pollexfen moved to quash it; because it does not appear, that he gave any formal Carth. 28. Pasch. 1 W. & M. B. R. S. C. by name of the King v. the Inhabitants of St. Peter's in Malden, and Heybridge in Essex; but says, that

the Court confirmed the order; for that the parish officers had notice sufficient within the intent of the statute, tho' not within the letter; because the

assessing this man to the parish rates, and receiving the money assessed is a sufficient evidence that they knew that he was an inhabitant there, and the meaning of the statute is no other.——
 Show. 12. S. C. by the name of the KING v. PAYNE, says, that the Court held that it gained a good settlement, though there was no notice in writing given to the church-wardens of his coming, and that coming in publickly by taking a house, and that being rated in the poor's rates, and so observed by the officers of the parish in their parish-books is sufficient notice, and the rather because *by the preamble it is apparently meant only against private and clandestine removals, and not publick ones, of which the parish takes notice itself.*——2 Shaw's Pract. Just. 57. cites S. C.——
 Just. Case Law. 246. cites S. C.——Dalt. Just. cap. 73. cites S. C.——Shaw's Parish Law, 234. cites S. C.——Foley's Poor Laws, 108, 109. cites S. C.

[377] 3. 3 & 4 W. & M. cap. 11. S. 3. Enacts, that *the 40 days continuance of a poor person, intended by the acts to make a settlement, shall be accounted from the publication of a notice in writing, which he shall deliver, of the house of his abode, and the number of his family, to the churchwarden or overseer of the poor, which notice, the churchwarden or overseer is required to cause to be read publickly immediately after divine service in the church, on the next Lord's day; and the churchwarden or overseer is to register the said notice in the book kept for the poor's account.*

Poor's Settlements,
 192, 193.
 pl. 238. cites
 S. C.——
 Nelf. Just.

4. None but a person removeable is to give notice; because they cannot be disturbed; as one that rents 10l. per ann. a servant, &c. 2 Salk. 473. Trin. 8 W. 3. B. R. in the case of St. Nicholas v. St. Helen's Parish.

Poor's Settlements,
 192, 193.
 pl. 238. cites
 S. C.——
 Nelf. Just.
 543. cites
 S. C.——
 Just. Case
 Law, 239.
 cites S. C.——
 Dalt. Just.
 cap. 73.
 cites S. C.

Poor's Settlements,
 194. pl. 239.
 cites S. C.——
 Shaw's
 Parish Law,
 232. cites S. C.

5. If a parish into which a person comes, *takes notice of him, and looks on himself as one of the parish, as by relieving him, making him an officer, &c.* There after a long continuance, we would have *presumed notice* given, because the notice need not be exactly proved; for the churchwarden to whom it was given, and the witnesses attesting the matter, may be dead, but in the principal case it was returned on the order, that he clandestinely removed himself, so that he might easily continue in the same manner; wherefore in such cases we must construe the statute strictly. 2 Salk. 473. Trin. 8 W. 3. B. R. St. Nicholas v. St. Helen's Parish.

6. Holt Ch. J. said, if a poor man had been *relieved several years in a parish*, he should presume notice in writing; but it is but evidence to the justices. Comb. 382. Trin. 8 W. 3. B. R. Anon.

7. A. and his wife were removed by two justices to B. where he had *exercised the trade of a smith for a year*, and worked for, and was * constantly employed by, most of the inhabitants of B. and by the lord of the manor, and the justices of peace there. This order was reversed at sessions, and both orders returned in B. R. reciting the special matter, that he was *apprentice in D.* and that he had not given any notice in writing, nor was assessed, nor bore any public office in B. and now the order of sessions was confirmed; for though such things might have been allowed before the late act, yet now it being an *explanatory act* must not be enlarged by equity, and we are confined to it. Comb. 410. Hill. 9 W. 3. B. R. Foston v. Dalbury Parish.

Shaw's Pa-
rish Law,
229. cites
S. C.—
Poor's Set-
tlements,
178 pl. 222.
Trin. 6 W. 3.
B. R. cites
S. C. by
name of
Blood's
case.—
Carth. 396.
Hill. 8 W. 3.
B. R. S. C.
by name of

Dalbury v. Foston Parishioners.—5 Mod. 330, 331. S. C.

* This publick notice taken by the parish might perhaps have satisfied the statute 1 Jac. 2. but there being doubts concerning the notice prescribed by that act, the 3 & 4 W. & M. was made to explain it, and this later statute has particularized the notice, and what shall be tantamount to it, and what not; this is not among the particulars of the statute; for which reason the order was confirmed. 2 Salk. 476. Hill. 8 W. 3. B. R. S. C. by name of the Inhabitants of Talbury v. the Hamlet of Foston in Scropton.—Nelf. Just. 543. cites S. C.—Dalt. Just. cap. 73. cites S. C.—Foley's Poor Laws, 114. S. C.

8. *Payment of the land-tax* hath been held sufficient notice, where charged as paid in a parochial limit, though not a parochial tax. Per Holt Ch. J. Comb. 410. Hill. 9 W. 3. B. R. in case of Foston v. Dalbury Parish, alias Blood's case.

Poor's Set-
tlements,
179. pl. 222.
cites S. C.—
5 Mod. 330,
331. S. C.

by name of Dalbury v. Foston Parishioners cites it as held in the case of Ipswich.—Payment of taxes is equivalent to a notice in writing. 2 Salk. 523. Mich. 7 W. 3. B. R. Talborn v. Boston Parishes.—Poor's Settlements, 180. pl. 223. cites S. C.—2 Shaw's Pract. Just. 58. cites S. C.

9. It was moved to quash an order of settlement for that the only ground of settling a poor person in a parish appears upon the order to have been, that the *banns of matrimony* of the poor person were published in the parish church; which is ill; for the notice given to the parish must not only be in writing, but the other ceremonies required by the 3 & 4 W. & M. must be observed, and that act being an explanatory act cannot be taken by equity; and the order was quashed, per Cur. 5 Mod. 454. Mich. 11 W. 3. The King v. the Inhabitants of Chertsey.

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Foley's
Poor Laws,
113. S. C.—
Nelf. Just.
543. cites
S. C.—
Just. Case
Law, 239.
cites S. C.—
S. P. Dalt.
Just. cap. 73.

10. One N. left his wife and children upon a parish, and gave a warrant of attorney to the officers of the parish to take and seize his goods, and afterwards lived 40 days in the parish. And it was held, that the warrant was a good notice in writing to the officers, and that the party's living there 40 days after had gained him a settlement. MS. Cases, pl. 44. cites it as cited by Eyre J. MS. Rep. 175. Nowel's case.

S. C. cited
by Eyre J.
MS. Cases.
Mich. 8
Ann. B. R.
in the case
of the Queen
v. the Inha-
bitants of
St. Mary

Arches, and the Inhabitants of the Parish of Honiton.

11. The notice to be given according to the statute does not extend to a servant, or an apprentice; per Powis. 11 Mod. 205. Hill. 7 Ann. B. R. in case of the Parish of St. Giles v. Weybridge Parish.

S. P. Per
Holt Ch. J.
11 Mod.
206. in case
of the parish
of St. Al-
because the
justices

ban's v. the Parish of St. Botolph's Bishopsgate.—S. P. Per Holt Ch. J.

Justices of peace, though there had been notice, cannot disturb him. 12 Mod. 441. Hill. 12 W. 3. B. R. Anon.

Mr. Foley says, it is observable, that this case, and the case of the King v. the Inhabitants of Malden, supra pl. 2. were only upon the clause of the statute of the 1 Jac. 2. S. 3. which requires notice only to one of the churchwardens or overseers; for they were determined upon a person's coming into a parish before the statute of 3 & 4 W. & M. was made; but since the 3 & 4 W. & M. cap. 11. S. 3. by which it is required, that such notice in writing shall not only be delivered to a churchwarden or overseer, but that he shall read, or cause it to be read publicly in the church, &c. [see pl. 3] he takes it, the law is different upon this clause, being an explanatory clause, than it was upon the clause of the 1 Jac. 2. as by these cases it appears. Ibid.

12. An order of 2 justices for removal of one John Crosby and Susan his wife, from the parish of Aldenham to Abbots Langley. The order of sessions stated the fact specially, viz. That about 40 years ago, John Crosby took a house in Aldenham, with the knowledge of the churchwardens and overseers, and kept a shop, and lived unmolested till this order of removal; that he came into the parish after the first of Jac. the 2d. that on the 5th of October 1688, the justices granted him a licence for buying and selling corn; that he kept a publick alehouse in Aldenham for 35 or 36 years, which was publicly known to the parish officers, that he had five children born and christened in the parish; that he was placed in a seat in the parish church by the churchwardens; that he did watch and ward, and served as juryman at court leets, and every year worked in the highways, or paid money to the surveyors to be excused; and the single point was, whether this did tantamount to a notice in writing, so as to gain a settlement after the 1st Jac. 2. It was insisted that it was; and the Court ordered them to shew cause; afterwards the rule was made absolute, that it did tantamount to a notice in writing sufficient to gain a settlement. Foley's Poor Laws, 110. &c. Hill. 2 Geo. 2. B. R. The Parish of Aldenham v. Abbots Langley.

(G) By serving Offices.

1. BY 3 & 4 W. & M. cap. 11. S. 6. If any person, who shall come to inhabit in any town or parish, shall on his own account execute any publick annual office in the town or parish during one year, he shall be judged to have a legal settlement in the same.

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Shaw's Parish Law, 236. cites S. C.—

A man is to be settled in that

2. A scavenger or * constable gains a settlement in that parish where he lives, although his office is not parochial, but a precinct office, and confined to more parishes than one. Poor's Settlements, 3. pl. 4. Hill. 1710. B. R. The Parish of St. Lawrence v. St. Mary's in Reading.

parish where he is an inhabitant, though he exercises his office in other parishes. As if there be several towns in one parish that maintain their own poor, and there is one officer for them all, and a man is chosen churchwarden of all the towns; yet he shall be settled in that town only where he lives. The statute as to the office says, (in a town or parish) but as to the payment of the taxes, it is (of a town or parish.) And none is a parish-officer but an overseer or churchwarden, and yet a constable or tithing-man are annual officers within a parish within the statute. So of a constable for the hundred which is for several parishes. So of a man's doing the office of a scavenger, that would gain a settlement; for the doing of the offices makes a man notorious, and is equivalent to notice. MS. Cases. Mich. 9 Ann. B. R. S. C.

* It was said, that doing the office of constable has been held a settlement, though he is chose in the Leet, and not by the parish: yet he is esteemed an officer, and is bound to do several parochial things. But Parker Ch. J. said, that that was the cause of the QUEEN v. SHERIFF HALES, the Leet and the parish were the same, and prima facie parish and vill are taken to be the same.

Cited

Cited MS. Cases. Mich. 9 Ann. B. R. in S. C.—But the serving the office of *constable* as *deputy* to another does not gain a settlement; for what he does, is in another's right. MS. Cases. Hill. 6 Ann. The Inhabitants of Lothsome v. Sheriff Hales.

3. Serving the office of *churchwarden* for a borough, which comprehends several parishes is a settlement in that parish within the said borough wherein he lived at the time of such service, though he was not chosen by that parish only, and though he exercised his office through the whole borough. 10 Mod. 13. Mich. 9 Ann. B. R. St. Mary's Parish in Reading v. St. Lawrence in Reading. Foley's Poor Laws, 121. cites S. C.—Shaw's Parish Law, 236. cites S. C.—Poor's Settlements, 8.

pl. 4. Hill. 1710. S. C. but mentions the office to be warden of the borough; and adjudged per Cur. that it gained a settlement.—And in a MS. which I have of this case the office is mentioned to be *warden of the borough*, (which is *in nature of a tithingman*) to execute the process of the justices of the borough, &c. but he is not to execute his office in one parish only, but *all over the borough*. And the Court was much divided, whether this was a settlement, or not? Because he was not elected into this office by the parish, neither was the exercise of his office confined to the parish; yet he is a public officer, and his office is partly exercised within the parish; so that the parishioners must take notice of him. And per Cur. it was held a good settlement, being within the express words of the statute of executing an office in a town or parish. Hill. 9 Ann. B. R. S. C.

4. The question was, whether *one appointed clerk of the parish by the parson*, and executing the office for a year, should gain a legal settlement within 3 & 4 W. & M. of which the words are, viz. Shall execute any annual office or charge? For it was objected, that this was not an annual office. To which it was answered, that the intent of the act was, that no officer under an annual one should gain a settlement, & *majus continet in se minus*; and that on general nomination to the office of parish clerk he is in for life, and is an officer by the common law; and so it was ruled, *absente Parker Ch. J.* 2 Salk. 536. Hill. 10 Ann. B. R. Gatton Parish v. Milwich Parish. Nell. Just. 543, 544. cites S. C.—Just. Case Law, 239. cites S. C.—Poor's Settlements, 198. pl. 241. cites S. C.—Ibid. 46. pl. 70. Mich. 1711. S. C. where it was in-

sisted, that this is not an annual office unless he comes in by consent of the parish; for at this rate the parson may put him in one day and put him out another, and so bring an infinite charge upon the parish. But the Court held, that this was not an office only, but a freehold, and a mandamus lies to restore him. 'Tis true, if he is *poor and has a family* they may remove him, but if *they let him continue a year* none can remove him; for although he came in by the parson only, yet the parish paying him is a consent and approbation.—2 Shaw's Pract. Just. 56. cites Mich. 1711. S. C. by name of Gayton v. Milwich.—S. P. Dalt. Just. cap. 73.—Shaw's Parish Law, 232. cites S. C.—Foley's Poor Laws, 123. Hill. 9 Ann. B. R. S. C. says, it was resolved, that a parish-clerk be chosen by the parson or parish, is such an officer as gains a settlement within the act of 3 & 4 W. & M. cap. 11.

5. It was held, that a person who was chosen a *tithingman*, for a year, and serves that year, was such an officer as gained a settlement within the act of 3 & 4 W. & M. Foley's Poor Laws, 123, 124. Hill. 2 Geo. in B. R. The Parish of St. Trinity, London, v. the Parish of Garsington, Oxfordshire. [380]* Poor's Settlements, 72. pl. 95. S. C. by name of the parish of Garsington

in Oxon v. St. Trinity in London; and reports it, that a *certificate man* went into Garsington, and was *elected tithingman*, and served the whole year, but was not sworn into the office till half a year after. The order was drawn * up specially and brought into B. R. but it was quashed for want of form; but the Court were of opinion as to the merits, that the man gained a settlement in Garsington, all settlements being expounded favourably, liberally, and most beneficially for poor people. Note, the act says, *legally admitted into any annual office*. Poor's Settlements, 72. pl. 95. Pasch. 1 Geo. B. R. The Parish of Garsington in Oxon v. St. Trinity in London

Poor's Set-
tlements,
94. pl 127.
S. F. Ad.
judged ac-
cordingly.
Per Cur. the

6. It was resolved per tot. Cur. that a *collector of births and burials* was a sufficient officer to gain a settlement within the act of 3 & 4 W. & M. Foley's Poor Laws, 124. Trin. 5 Geo. B. R. between Bisham & Cook.

Per Cur. the King v. Hawkins.——Shaw's Parish Law, 237. cites S. C.

See Re-
moval.
(I) (K)

(H) *By Orders.* What Orders shall be said *conclusive or final*; and what shall be said an ascer-
taining a Settlement.

2 Shaw's
Pract. Just.
25. 26 cites
S. C.——
Dalt. Just.
348. cap. 73.
cites S. C.
——Shaw's
Parish Law,
197. cites
S. C.

1. **I**T was moved to set aside an *order of sessions for the settlement of a poor person in a town*, who had been sent thither by a warrant of 2 justices; and it was confirmed on an appeal to the sessions. But the Court would hear nothing of the merits of the cause, the order of the sessions being in such case *final*, unless there were an error in the form. Vent. 310. Pasch. 29 Car. 2. B. R. Anon.

2. By 3 & 4 W. & M. cap. 11. S. 9. It is provided, that if any persons find themselves aggrieved by any determination which any justices of the peace shall make in the cases [therein] aforesaid, they shall have liberty to appeal to the next general quarter-sessions of the peace for the said county, riding, or division, city or town corporate; who, upon full hearing of the said appeal, shall have full power finally to determine the same.

2 Shaw's
Pract. Just.
23, 24. cites
S. C.——
Nelf. Just.
547. cites
S. C.——
Shaw's Pa-
rish Law,
195. cites
S. C.——

If on appeal
a parish is
adjudged
the last
legal place
of settlement
of a poor
person, that
parish is
concluded
thereby,
not only as
to the parish
from which
the first or-
der of re-
moval was,
but also as
to all other
parishes;

per Cur. 12 Mod. 419. Mich. 12 W. 3. B. R. The King v. the Inhabitants of Longeritchil.

4. It

4. It is a standing rule in B. R. that if upon an appeal the order of two justices is either affirmed or quashed upon the merits of the cause in relation to settlements, it shall be conclusive between the 2 parishes. 2 Shaw's Pract. Just. 25. cites Pasch. 10 Ann. Bishop Waltham v. Foram. 2 Shaw's Pract. Just. 54. cites S. C.—S. P. Dalt. Just. cap. 73.—Shaw's Pa-

rish Law, 197. cites S. C.—Ibid. 290. cites S. C.—MS. Cases, pl. 53. S. C. reports the 1st order dated 11 March 1718. and that the quarter-sessions was in April, and the 2d order was made in November. These orders being removed it was objected, that the last order was void, because the first order being quashed it was conclusive between the 2 parishes, and that *there being no faults in the first order it must be intended to be quashed upon the merits*; and to this the Court agreed, and that the sessions can only vacate or affirm; and if this order here had adjudged Bishop's-Waltham to be the last place of legal settlement it would have been naught. And per Eyre J. if this order had been confirmed it had been conclusive to all parishes; but Parker Ch. J. asked, how we can take notice but that there might be an *intermediate settlement between the 11th of March and November*? that the matter before the 11th of March has been heard, and why should we take it that this last order was made upon a fresh settlement. Et adjournatur.—Foley's Poor Laws, 275, 276. S. C. by name of Bishop's-Waltham v. Fareham in the county of Southampton, reports, that the poor person was sent by 2 justices from B. to F.—F. appeals to the next sessions, where the order was quashed; then one of the justices who made the first order, with another justice, made a new order and removed him again from B. to F. and F. appeals, and the sessions confirm the order. It was objected, that this is wrong; for the first determination at the sessions is final between those 2 parishes, and the justices had no power to make a 2d order. Curia; unless the pauper had gained a new settlement in the parish of F. the justices could make no new order, and the new order must be quashed.

5. Upon an order made 30 years ago on the parish of Budworth for maintenance of a bastard child born in the Township of Dumpy within that parish, which order was now removed before the Court by certiorari. It was held 1st, That an order made by 2 justices on the overseers of a parish for raising a sum towards the maintenance of a bastard or poor person does not determine the settlement of the person to be in that parish; because that is not contested, but presumed. 2dly, that the clause in the statute 13 & 14 Car. 2. cap. 12. which provides, that distinct townships in large parishes in the northern countries shall respectively provide for their poor under the penalty in 43 Eliz. cap. 2. must be understood with respect to the maintenance of poor and impotent persons, and not with respect to bastards. 1 Salk. 122. pl. 8. Hill. 5 Ann. B. R. Budworth v. Dumpley. Poor's Settlements, 157. pl. 207. cites S. C.

6. A man, his wife and 5 children, were removed by an order of two justices from A. to B. that being adjudged the place of their last legal settlement. The order was quashed on appeal to the next quarter-sessions, and the man and his family came back to A. and were removed again to B. by another order, which being removed by certiorari into B. R. it was by consent of parties referred to the judge of assize, who directed a trial on a feigned issue; and at the next assizes B. had a verdict, and so both the former orders were quashed. But A. being dissatisfied with the verdict procured the parish officers of C. to let the man and family to dwell in a tenement there on purpose that C. might remove him to B. which was after done by order of 2 justices, which order was confirmed on an appeal to the next sessions; so that now A. was discharged of him; because an order confirmed on appeal makes a good settlement in that parish by whom the appeal is brought against all other parishes whatsoever. The Court would not quash the

order, but made a rule for the parish officers of C. to shew cause why an *attachment* should not go against them, but thought that when they came to shew cause they might consent to have the orders quashed: but they shewed no cause, and so the rule was made absolute. 8 Mod. 200. Mich. 10 Geo. Wrotham Parish in Surrey v. St. Olaves.

[382] (I) *By Parents' Settlement; and Orders relating thereto.*

1. **P**OOOR children whose parents are dead are to be set on work, relieved or maintained at the charge of the town where they were dwelling at the time of the death of their parents, and are not to be sent to the place of their birth, &c. Dalt. Just. 227. cap. 73. cites it as the direction of Fleming Ch. J. 11 Jac. Weston v. Cowledge.

Dalt. Just. cap. 73. cites S.C.—Before the statute of 1 Jac. 2. an idiot could gain a settlement; for till then notice was not necessary, but since he shall follow the settlement of his father; per Cur. 12 Mod. 322. Mich. 11 W. 3. B. R. Anon.

2. The father of an *idiot* ought to maintain him; and if he cannot, the parish or place where his father is settled, must: and there is no difference between an idiot and any other poor child. 2 Salk. 427. Mich. 8 W. 3. B. R. Hard's case.

The child shall follow the settlement of its parent, unless he gains a distinct settlement; per Cur. 12 Mod. 322. Anon.—S. P. MS Cases. Mich. 5 Ann. The Queen v. Clifton, Burton, and Great Saukey.—Generally all children are to be sent to and settled with the parents. 2 Shaw's Pract. Just. 62.

3 A settlement of the father is so for the child; per Cur. 12 Mod. 383. Pasch. 12 W. 3. B. R. in the case of the Inhabitants of Spitalfields v. the Parish of St. Andrew.

6 Mod. 87. Mich. 2 Ann. B. R. S. C. held accordingly.—Poor's Settlements 239, &c. pl. 281, 282. S. C.—Nell. Just. 642. cites S. C.—Just. Case Law, 238. S. P.—Dalt. Just. cap. 73. cites S. C.—Shaw's Parish Law, 236. cites S. C.—

4. H. was settled at Cumner, and had several children born there, and afterwards he removed to Milton and gained a settlement by renting a tenement of the value of 10l. per ann. He became poor, and his children under the age of 7 years were sent back to Cumner by order of 2 justices, which was confirmed at the sessions. Powel J. held, that when a child is sent with his parents by reason of nurture, it gains no settlement; but here the children did not come to Milton by order. The children's settlement shall not be divided from the father's, for that would be unnatural: when a man gains a settlement for himself his wife and servants, he shall gain a settlement for his children also. Holt Ch. J. said, the question here is, whether the first settlement by birth is altered? And said, it was hard, he confessed, to remove the child from the father. And afterwards he held, that in this case the settlement of the father at Milton was a settlement for the children also. 2 Salk. 528, 529. Trin. 1 Ann. B. R. Cumner Parish v. Milton Parish.

S. C. And per Holt Ch. J. the place where legitimate children are born is not the place of their settlement; for let that be where it will, the children are settled where their parents are settled: as for instance, if the father is settled in the parish of H. but goes to work in the parish of B. and before

before he gains any settlement there has a son born in the parish of B. and then dies, this child shall be sent to the parish of H. For 'tis not the birth but the settlement of the father that makes the settlement of the child; and if the father has gained a new settlement for himself (as he has done in the principal case) he hath likewise gained a new settlement for his children, who do not go with him to this new settlement as nurse-children, but as part of his family; and asked, to what purpose the father, upon coming into a new parish, is to give notice of the number of his family, but upon a supposition that they may gain a settlement there. 3 Salk. 259 Trin. 3 Ann. E. C.——S. C. cited Poor's Settlements, 57. pl. 81. in the case of St. Saviour's, Southwark, v. St. Catherine's.

5. If a *man dies* and after a *child is born*, this child shall be settled where the father was settled before his death. MS. Cases. Mich. 5 Ann. The Queen v. Clifton, Burton, and Great Sankey.

6. An order to remove John Darby to the parish of Middleham [383] in Yorkshire, being of the age of 10 years, because it was the place of his father's settlement, was quashed, because the son might have gained a settlement in some other parish by serving an apprenticeship (or as Parker Ch. J. said where he is born out of the parish where the father lived, and always lived with a grandmother, and it would be very hard to remove him to the father's parish as part of his family;) and though it be generally true that the children follow the settlement of their father (i. e.) while they are under the age of 7 years, yet when they are above 7 years old, if the children had not gained another settlement it must be specified so in the order. Orders being judgments, they as well as executions must be certain, and it is not a necessary consequence, because the father was settled there, therefore the son is; but where children are under seven, this certainty is not required, because they are then incapable of having any settlement but the father's. MS. Cases. Mich. 9 Ann. B. R. Anon.

The Court was moved to quash an order of sessions, which removed a man with his wife and children to N. because tho' N. was the last legal settlement of the father, yet it is no consequence that it must be so of the children; for they

might have gained a new settlement; but per Cur. that it is not to be supposed. 10 Mod. 272. Mich. 1 Geo. B. R. Parishes of Newark v. Worksworth.

7. Six children of A. a widow, were, by an order of 2 justices, which specified their names and ages, removed from the parish of St. George to the parish of St. Katharine, as being the place of their last legal settlement; upon this the parish of St. Katharine appeals, and thereupon the whole matter appeared to be thus: A. marries a man who had a settlement in the parish of St. Katharine, and all her 6 children were born there, and she lived with her husband there till he died; after his death she goes into the parish of St. George with her 6 children, and hires a house of 12l. per annum, and lived in it with her children for 4 months, and * paid the queen's tax. The justices send those 6 children to St Katharine's, as being the last place of their father's settlement, which of consequence was their settlement, so that the single question upon these orders was, whether the children should be settled where the father was last settled, or have a settlement with the mother in the parish of St. George; and the whole Court were of opinion that the 6 children were settled in the parish of St. George, where the mother's last settlement was. Foley's Poor Laws, 254, 255.

Poor's Settlements, 57. pl. 81. cites S. C. by name of St. Saviour's Southwark, v. St. Katharine's—So where 2 justices of peace removed E. B. from P. to W. as the place of her last legal settlement, W. appealed, after hearing which appeal the sessions stated the fact specially, viz.

That it appeared to that Court Mich. 1 Geo. B. R. The Parish of St. George in Southwark v. the Parish of St. Katharine near the Tower, Middlesex.

that J. B. rented a house, and some closes at W. about 30l. per ann. and inhabited in the said house for several years, and died insolvent, and left a widow and one daughter, whose name is E. B. the widow soon after removed to P. to a messuage of about 40s. per annum value, and some lands about 10l. per annum that was her own estate for life, both house and land being copyhold, and took her said daughter with her then about the age of 14. The daughter lived with her mother at P. above 2 years in the said messuage, but the mother let the land to a tenant, whereupon the sessions was of opinion that the said E. B. was settled at W. the place of her father's settlement, and not at P. where she lived with her mother, and therefore confirmed the order for sending her to W. These orders being removed into B. R. it was moved to quash them, because it appeared by the fact stated that the last legal settlement of E. B. was at P. because the mother being a widow, and having gained a new settlement after her husband's death the daughter gained a settlement also as part of her family, and there is no difference between a father's gaining a settlement and a mother's in such a case as this; for the mother is obliged to provide for her children after the husband's death, as the father was when living, and she could not leave this daughter behind her, neither could she be removed from her. And this case of the inhabitants of ST. KATHERINE'S v. the inhabitants of ST. GEORGE'S, SOUTHWARK, was cited as a case expressly in point, where such orders as these were quashed for the reasons before alleged. The Court ordered the copy of the orders of St. Katherine's and St. George's to be delivered to them, and that it should be stirred again. And afterwards upon reading these orders, the Court, upon the authority of that precedent, quashed the orders in the present case, and adjudged the place of E. B.'s last legal settlement to be at P. 2 Ld. Raym. Rep. 1474. Hill. 13 Geo. Inhabitants of Wooden v. the Inhabitants of Paulspury.

* 2 Ld. Raym. Rep. 1474. in citing this case in the case of Woodend v. Paulspury mentions that she never paid any thing to her landlord.

[384] 8. T. B. lived at W. many years, where he gained a settlement, and during that time R. his son lived with him; T. B. bought an estate at E. and lived upon it, but R. being 30 years old and married, continued at W. but by order was removed to E. and ill. It was objected that until such time as he gained a settlement by his own act he was to follow the settlement of the father, and that it was not material what age the son was, or whether married or not, and in this case the son never obtained any settlement, but as part of his father's family; but the order was quashed; for the settlement of the son and family was at W. MS. Cases. Trin. 7 Geo. East-Woodhay v. West-Woodhay.

9. A poor man lived in St. G. with his wife and children, and died there, and all his children lived there, but he being settled in E. his removal was intended, but prevented by his death. The question was, whether the wife and children should be sent to E. Per Prat Ch. J. and Powys J. it will be hard so to do, the children never being there at all and born in E. and quashed. Per Eyre and Fortescue the settlement of the father is the settlement of the child, and he shall follow first the settlement of the father then of the mother, and if these cannot be known he is to go to the place of his birth, as in case of a bastard or a vagrant, as wanting the settlement of a father and mother, being nullus filius, and a contrary construction would be to make all the children vagrants. This right of the children arises by act of law, and is out of the case of residence for 40 days. MS. Cases. Mich. 9 Geo. Anon.

So where Sarah E. with Dorothy her daughter, aged 5 years, was removed from St.

10. It appeared to the Court by the testimony of E. P. that the said E. P. was, at the time the said order was made, a married woman, and that her husband was one T. P. who was born in Wiltshire, but in what place or parish he had a settlement he never informed her, nor does she know; but that he is run away and still living

living for what she knows. The order of 2 justices was to remove this E. P. and her child aged 9 years, to the place of the mother's settlement: the order of sessions quashed that order. Now this Court quashed the order of sessions, and confirmed the order of the 2 justices; for that this *E. P. and her child ought to be settled where E. P.'s settlement was before marriage.* Foley's Poor Laws, 252, 253. Hill. 12 Geo. B. R. The King v. the Parish of Westerham in Kent.

Margaret's to St. Giles's as being the place of Sarah's last legal settlement, before her marriage, she having married an

Irishman, who had no settlement; and it was adjudged that Dorothy her daughter shall be settled with her mother in the parish of St. Giles, where Sarah E. her mother's settlement was before her marriage, her husband having no settlement, and the order was confirmed. Foley's Poor Laws, 251, 252. Mich. 3 Geo. 2. B. R. The Parish of St. Giles v. the Parish of St. Margaret's in Westminster. — Poor's Settlements, 74. pl. 98. S. C.

(K) By Payments.

See (F)

1. **BY** 3 & 4 W. & M. cap. 11. S. 6. *If any person who shall come to inhabit in any town or parish shall be charged with and pay his share towards the publick taxes of the town or parish he shall be adjudged to have a legal settlement in the same.*

Rating a poor occupier of a house for his landlord to the king's

taxes, is a rating him within the new explanatory act to make a settlement. Ruled. Cumb. 282. Trin. 6 W. & M. B. R. Anon. — Poor's Settlements, 180. pl. 224. cites S. C. — Shaw's Parish Law, 228. cites S. C.

But Pasch. 7 Ann. it was held, that *paying of taxes for the landlord* will not gain a settlement for the tenant; he must be charged to them as well as pay them upon this statute. The word (*charge*) has a proper signification, and means such taxes as are chargeable upon the tenant. MS. Cases. The Queen v. the Inhabitants of Lancaster.

2. It was held, that if a man is taxed, and after taxation, stays [385] in the parish 40 days without giving notice, it is no settlement within the new statute, unless he pays the tax; for it *must be taxing and paying*, and not taking only that makes a settlement. 2 Salk. 523. Mich. 7 W. 3. B. R. The Parish of Talborn v. Boston.

Poor's Settlements, 179. pl. 223. cites S. C. — a Shaw's Pract. Just.

58. cites S. C. — Nelf. Just. 544. cites S. C. — Just. Case Law, 523. cites S. C. — Dalt. Just. cap. 73. cites S. C. — Foley's Poor Laws, 127. cites S. C.

D. an inhabitant of the parish of St. Helen's, where he had 4 children, removed from thence into the parish of St. Nicholas, where he lived some time, and was *taxed to the poor*, but was removed back to St. Helen's before he paid the tax, and there died; afterwards his children were by order of the justices removed into the parish of St. Nicholas, because their father had gained a settlement there by being taxed to the poor, and this by virtue of the statute 3 & 4 W. 3. But per Cur. there must be paying as well as taxing to make a settlement by that statute. 3 Salk. 253. The King v. the Parish of St. Nicholas in Abingdon. — Poor's Settlements, 185. pl. 229. cites S. C. — Skin. 620. S. C. by name of the Parish of St. Nicholas in Abingdon's case. And per Holt C. J. the words of the statute are tax and pay, and therefore taxation without payment is not sufficient. — S. P. a Shaw's Pract. Just. 54.

3. A man went to M. and took a house there of 1l. per annum, wherein he lived a year and a half, and paid the rates and taxes due for the said house; and the justices at the sessions held, that the rate for a house, without a rate on his person, was not sufficient to make a settlement; but the court of B. R. quashed this order for this cause, and held him settled at M. 2 Salk. 478. The Parish of St. Mary le More v. Heavytree in Devon.

S. P. Carth. 28. The King v. the Parish of St. Peter's in Malden and Heybridge in Essex. — S. P. Just. Case Law,

240. — So where G. being a poor man lived at B. in a place called Roscoe's Tenement, and paid

paid taxes there by the name of the occupier of Roscoes, and for that reason he and his wife and children were sent thither; which order was confirmed upon appeal to the sessions, and now it was moved to quash these orders, because this man ought to be personally charged to pay taxes, otherwise he gains no settlement by paying them as occupant of a tenement, though he was likewise charged as farmer thereof at that time; for the word farmer doth not prove him to be occupant, because he may let the tenement over to another. But on the other side it was insisted that paying taxes by the name of Roscoe's tenement, and naming him farmer of the same at that time, is a sufficient designation of the person to gain a settlement there, and the Court being of that opinion these orders were confirmed. 8 Mod. 38. Pasch. 7 Geo. B. R. The King v. Brickhill Inhabitants.——S. P. 2 Shaw's Pract. Just. 58. cites Pasch. 1721. Facy's case, and seems to be S. C.——Shaw's Parish Law, 234. cites S. C.——Nelf. Just. 544. cites S. C.——S. P. Dalt. Just. cap. 73.

But where A. *rented a tenement, with the appurtenances in K. for 3 years and upwards, at the yearly rent of 4l. 10s. and paid all parochial taxes for the same in his own right, but was not rated in the parish-books: but the name of Richard Cotes, the tenant that rented the same tenement before A. was kept in the levy-books; quære if A. gained a settlement in the parish of K. The whole Court was of opinion he did not, because he was not assessed as well as paid. Foley's Poor Laws, 129, 130. Pasch. 4 Geo. 2. B. R. The Parish of Kintare v. the Parish of Kingswinford.*

2 Shaw's Pract. Just. 55. cites Trin. 1710. an inhabitant of the parish or town where he lives. Poor's Settlements, 1. pl. 1. Trin. 1710. B. R. Anon. Shaw's Parish Law, 231. cites S. C. S. P. MS. Cases. Trin. 9 Ann. B. R. in the case of the Queen v. St. Michael's Cornhill.

4. Paying to the county bridge gains no settlement; for there all the county is liable, and he pays as one of the county, and not as an inhabitant of the parish or town where he lives. Poor's Settlements, 1. pl. 1. Trin. 1710. B. R. Anon.

5. If a man be *assessed to the publick taxes* he is not to be accounted a person likely to become chargeable. MS. Cases. Trin. 9 Ann. Parish in Derby.

But Poor's Settlements 4. pl. 4. Hill. 1710. in the case of the parish of St. Lawrence v. St. Mary's in Reading, there is a note that paying the land-tax does gain a settlement in London.

6. Paying the *land-tax* is no settlement, for that is a county-tax. So of a hundred or any other county-tax. MS. Cases. Trin. 9 Ann. B. R. The Queen v. St. Michael's, Cornhill.

7. Eyre said, it has been held by a very learned judge upon a reference at the assises, that *doing work in repairing the highways* was a good settlement; for this is a charging him with the publick levies of the town or parish. MS. Cases. Trin. 9 Ann. B. R. in the case of the Queen v. St. Michael's, Cornhill.

[386] 8. Adjudged, that paying to a *scavenger's rate* does not gain a settlement, it being a ward, and not a parochial-tax; and *one ward in London does contain 6 or 7 parishes.* 2 Blackerby 293. Mich. 9 Ann. The Parish of Cripplegate v. St. Michael's, Cornhill.

MS. Cases. Trin. 9 Ann. B. R. S. C. by name of the Queen v. St. Michael's, Cornhill. S. P. Dalt. Just. cap. 73. S. P. cited by Parker Ch. J. 10 Mod. 14 Mich. 9 Ann. B. R. in the case of St. Mary in Reading v. St. Lawrence in Reading. S. P. Poor's Settlements. 4. pl. 4. Hill. 1710. B. R. The Parish of St. Lawrence v. St. Mary's in Reading. Shaw's Parish Law, 236, 237. cites S. C. S. P. Just. Case Law, 240. But Poor's Settlements, 4. pl. 4. says, note, that it does in London.

Where the question was, whether paying to a *scavenger's rate* was sufficient to gain a settlement without notice; and upon reading the statute of 2 W. & M. cap. 8. S. 10. which makes these scavenger's rates either parish rates, ward rates, or division rates: the Court was of opinion, that if the rate was *confirmed to a parish*, the paying of the rate would be sufficient to gain a settlement. Foley's Poor Laws, 126, 127. Pasch. 10 Ann. in B. R. Parish of St. Giles v. the Parish of St. Mary, Newington, in Surry.

Foley's Poor Laws, 126. S. C. Mich. 12 9. The *parish* of St. Giles, Cripplegate, is *by consent of the inhabitants divided into 4 liberties.* Each of the liberties makes a rate

rate for the scavenger, according to the 3d and 4th of W. & M. upon the inhabitants of that liberty. These rates are confirmed by 2 justices; *a man that is rated under one of these rates*, is adjudged at Hicks's-Hall to gain a legal settlement; but it was objected, that this way of rating was void; for the act directs that these rates shall be made by the churchwardens, overseers of the poor, and the surveyor of the highways; but this rate here is *made only by the constable and inhabitants*. But per Parker Ch. J. Powel, and Powis, this being a manner of rating by consent of the whole parish, and being only divided among themselves for the ease of collecting, it is hard that any of the same parish should come and say this is a void rate, when it is acquiesced under, and the money rated is paid; and Parker Ch. J. said they could not have the money back again; but Eyre doubted, because it was a void rate. And adjudged per Cur. a good settlement. MS. Cases. Pasch. 10 Ann. B. R. The Queen v. St. Giles's, Cripplegate, and St. Mary, Newington.

Ann. this was held to be a contributing to the public levies of the parish, it being a parish charge, and the parish have had as much benefit of the contribution as if it had been a good rate. MS. Cases. S. C.

10. 9 Geo. 1. cap. 7. S. 6. Enacts, that *no person shall be deemed to have a settlement in any city, parish, &c. by reason of his paying to the scavenger's rate, or repairs of the highway*.

11. It was moved to quash an order that was specially stated thus. Thomas King *had a messuage and lands in the parish of S. for which he was rated to the poor's rate 3s. a levy, and lets part of this to one Richard Stover, at 40s. a year; the overseer of the poor, at one time, gathers 3d. at another time 6d. of this Richard Stover, as his proportionable part of 3s. and whether by this Richard Stover gained a settlement?* Et Curia seemed to think he did not, because he never was taxed; but there was a rule to shew cause why the order should not be quashed. Afterwards the rule was made absolute, Richard Stover not being taxed. Foley's Poor Laws, 128. Mich. 13 Geo. B. R. Parishes of Seal and Tongham v. Worplesdon in Surry.

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See (A) pl.
12. (C)

(L) By Renting.

1. **O**NE *Wine and his wife lived in the parish of Laysters; she had a house and land given her there, by her brother for life; after 4 or 5 years her brother put them out, and they went and rented a house in the parish of Kimbolton for a year. Two justices ordered the person who let them the house to discharge them of it after the end of the year, which he did; Winde and his wife apply to the sessions, who make an order upon the overseers to provide him a house, paying a yearly rent; and in default thereof, that they do provide for him. This was referred to Whitlock Judge of Assise, who held this order to be illegal, and that the man might go to Laysters when he would, where he had means in the right of his wife. 2 Bulst. 347, 348. at Salop Assises, 19 March, 7 Car. The Vill of Kimbolton v. the Vill of Laysters, Com. Hereford.*

S. C. cited
Foley's
Poor Laws,
262, 263.

2. If

S. P. Shaw's
Parish Laws
228. cites
S. C.

2. If one *does but hire a house*, the law does not unsettle such person. 2 Shaw's Pract. Just. 52. cites Dalt. 98.

S. P. MS.
Cases, 10
Ann. Anon.

3. Renting a *farm* is not a settlement, if he *leaves it within 40 days*. Per Holt Ch. J. 12 Mod. 20. Pasch. 4 W. & M. B. R. The King v. . . .

S. P. cited
by Sir Peter
King. 2
Salk. 535.
Mich. 9
Ann. B. R.
in case of
Dunsford v.
Ridgwick.
S. P. cited
MS. Cases,
pl. 40.
Mich. 9
Ann. B. R.

4. The act says, a person to gain a settlement must rent a tenement of 10l. per annum; he rented *two tenements of 5l. per annum each*: and per Powel, the word (tenement) is nomen collectivum. Per Lord Parker, the design of that clause was, if a person was of ability and competency to stock land of 10l. per annum, although they were 10 *tenements before*, yet *as to this purpose they are quasi one tenement*; and so adjudged per Powel, in another case that came before him at Launceston assises. Poor's Settlements 3. pl. 3. Mich. 1710. B. R. The Parish of Farnham's case.

in case of THE QUEEN v. THE INHABITANTS OF DUNSFORD AND RUDGWICK, as held by Powel and Gould J. at Launceston assises, which was agreed now per Cur. For tenements is nomen collectivum; and in assise of a tenement the plaint may be of several tenements, and it is no matter who was the tenant's landlord; for if he were of ability to rent such estate, he is to be looked upon as a person not likely to bring charge to the parish, whether he rents 10l. by parts, or in one intire tenement. S. P. Shaw's Parish Law, 231. S. P. 2 Shaw's Pract. Just. 55. But renting *several distinct tenements in several parishes*, and both, or all of them, amount to 10l. a year, this will not make a settlement. Per Cur. 10 Mod. 390. South-Sidenham v. Lamerton Parishes.

Shaw's Pa-
rish Law,
231. cites
S. C. S. P.
2 Shaw's
Pract. Just.
55. cites
Trin. 1710.
Cornhill.

5. If a man rents a *house of 10l. a year*, and the house *lies in two parishes*, he is parishioner where his bed is, and where he lodges: but where a man has a * *shop in one parish, and lodges in another*, he is a parishioner where he drives his trade. Poor's Settlements 1. pl. 1. Trin. 1710. B. R. Anon.

* S. P. MS. Cases. Trin. 9 Ann. B. R. in case of the Queen v. St. Michael's, Cornhill.

Shaw's Pa-
rish Law,
237. Hill.
1710. S. C.
If a man
rents 10l.
per annum,

6. If a man rents a piece of *land of 10l. per annum, but no house is belonging to it*, it gains no settlement: the statute says, coming with a design to settle, which cannot be here; for how can he be said to inhabit upon land? Poor's Settlements 5. pl. 8. Pasch. 1711. B. R. The Parish of Sedgemore v. Dulleton.

it will be no settlement, if he *does not lodge upon it*. MS. Cases. 86. Trin. 3 Geo. B. R. Anon.

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2 Shaw's
Pract. Just.
51. cites
S. C. Ibid.
58. cites
S. C. Shaw's
Parish Law,
228. cites
S. C. Just.

7. An order was drawn up specially to have the opinion of the Court, whether renting of a *water-mill of 10l. per annum*, would make a settlement? Et per totam Curiam clearly, a mill is a tenement, and * the renting must gain a settlement within the statute. 2 Salk. 536. pl. 26. Hill. 10 Ann. B. R. Evelin Parish v. Rentcombe Parish.

Case Law, 241. cites S. C. If a man rents a *mill of 30l. per ann. but has stock*, this is a good settlement. MS. Cases. Hill. 10 Ann. B. R. Anon. Foley's Poor Laws, 78. seems to be S. C. says it was an order drawn up specially to have the opinion of the Court; and the *questio* was, whether a miller renting a windmill of 10l. a year, and living and constantly lying in it, was such a tenement of 10l. a year as would gain a settlement? Et per tot. Cur. it was.

So where a person *rented a mill of 10l. per annum*, who *assigned the lease over to the person who was now removed during his will, as long as he paid him his rent*. He continued *two years*, and

and partially paid the rent; and the whole Court were of opinion that it was a settlement; quod nota. Poor's Settlements, 100. pl. 135. Hill. 1721. B. R. St. Mary's in Guildford v. Cranley in Surry. S. P. 2 Shaw's Pract. Just. 57. Shaw's Parish Law, 233. cites S. C.

A single man, though not his family, gains a settlement by renting a windmill of 10l. per annum; for a single person may inhabit and dwell there, which a man and his family cannot. Poor's Settlements, 4. pl. 5. Hill. 1710. B. R. The Parish of Newelm in Gloucestershire v. Rancorn in Oxfordshire.

8. G. D. rented an alehouse of 5l. per annum at Lady-day last for a year, and in May following he rented a piece of land of 6l. per annum, from Lady-day last past, but did not occupy it, or come into it till May following, it being beined up ever since Lady-day; he held it for two months, and then ran away. And it was held first, that it is not necessary that the messuage or tenement should be rented of one person; but be it rented of several, yet in him it is but one, and the statute is satisfied, he being of ability to be trusted with a tenement of 10l. per annum. 2dly, The running away does not alter the case, he being still liable to pay the rent, the contract still continues; and living there but * 40 days, the contract being for a year, it is good. The statute says, renting a tenement of 10l. per annum, but does not say for what time; as to that it is silent. Poor's Settlements 64. pl. 86. Northdipley v. Wootton-Underhedge.

Foley's Poor Laws, 79. Mich. 1 Geo. B. R. S. C. by name of North-Knibley v. Wootton-Underhedge. * Renting a tenement of 10l. per annum, and 40 days residence, gain a settlement; quod non

fuit negatum. Per Cur. Shaw's Parish Law, 237.

9. Renting one intire tenement of 13l. 10s. per annum lying in two parishes, viz. The house and land of 9l. 10s. per annum, lying in A. and 4l. land per annum, lying in B. This is a settlement in A. where the house is. The statute 13 & 14 Car. 2. says, a tenement of the value of 10l. a year; so that the rent is not at all material, nor does it say, that all the tenement must be in the parish where he lives. 10 Mod. 389. Trin. 3 Geo. B. R. South-Sidenham and Lamerton Parishes.

Poor's Settlements, 78. pl. 103. Pasch. 1717. B. R. S. C. MS. Cases. Trin. 3 Geo. B. R. S. C. For the plain reason of the law

is, that it is not probable that a person should become chargeable who has so much credit as to be intrusted with the management of a farm of the value of 10l. per annum.

10. Renting a tenement of 10l. per annum for a month is a fraudulent renting: but if a person rents a tenement of 10l. per annum, and continues 40 days, he gains a settlement within the meaning of 13 & 14 Car. 2. This was delivered by Parker Ch. J. for law, quod non fuit negatum; and says it was the case of CAMBERWELL. Poor's Settlements, 100. pl. 135. Hill. 1721. B. R. in case of St. Mary's in Guildford v. Cranley in Surry.

S. P. 2 Shaw's Pract. Just. 57. S. P. 2 Shaw's Parish Law, 237. S. P. Per Parker; for altho' he pay a

rent proportionable to the year, yet he is not thought of ability, or sufficient to be trusted with it for a whole year. Poor's Settlements, 64. pl. 86. Northdipley v. Wootton-Underhedge.

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11. A certificate person rented 14l. a year, but it lay in two parishes. Per Cur. it gains a settlement in the parish where he resides. Poor's Settlements, 110. pl. 148. Mich. 1722. B. R. Parish of St. John in Hartford v. Ampwell.

2 Shaw's Pract. Just. 57. cites S. C. Shaw's Parish Law,

233. cites S. C. The Court held, that the same reason holds as in the case of SOUTH-LAMERTON, Trin. 3 Geo. where a person rented a tenement of 10l. per ann. in two different parishes, and * that the law never designed to put a certificate person in a worse condition than another. Poor's Settlements, 106. pl. 143. Trin. 1722. B. R. S. C.

12. Renting

12. Renting 10l. per annum, being but a *lodger*, is a settlement. MS. Cases. The Queen v. the Inhabitants of Dumbleton.

13. 9 Geo. 1. cap. 28. *No shelterer in the Mint, or their families, shall be adjudged to have gained any legal settlement in the parish of St. George, by having rented any houses or lands of 10l. per annum, or upwards, unless such shelterer hath been rated and paid to the relief of the poor of the said parish, or hath served parochial offices there.*

S. P. Just.
Case Law,
238. S. P.
Dalt. Just.
cap. 73.
S.P. Shaw's
Parish Law,
230.

14. If a man, having a wife and children, takes a house in the parish of B. for a year, and in that year is wrongfully turned out of possession; whereupon he takes a house in another parish, and is there turned out, and then gets into a barn in another parish, and there his wife is delivered of another child, in this case they are all to be sent to the parish of B. out of which they were first illegally forced. 2 Shaw's Pract. Just. 54.

(M) By Service or Hiring.

1. **A**N inhabitant of B. hired a *maid servant* for a year, and covenanted to give her 40s. for her wages, and entertained her in his service; the maid *fell sick*, and her master turned her out of doors without giving her any thing, and she in travelling from B. to H. where her friends lived, and where she was born, was forced to beg for relief, whereupon she was sent as a vagrant to H. where she was born. H. sent her back to B. where she was entertained as a covenant-servant; whereupon they of B. procured an order of sessions to settle her at H. which was removed by certiorari into B. R. And the question there was, whether this was a good order or not for settling her at H. according to the statute? Or whether she ought to be settled at B. where she was entertained as a *covenant-servant*, and turned out of service, and forced to beg by that means. Roll. Ch. J. said, here seems to be a fraudulency in the master to make the servant a vagrant, that so he may be rid of her; but if one beg meat and drink for necessity in passing between one town and another, this is not begging to make one a beggar within the statute. And therefore the Court ordered that the party should be settled at B. where she was entertained as a covenant-servant, and not at H. where she was born, if cause were not shewn to the contrary. Sty. 168. Mich. 1649. B. R. The Parish of Hardingham v. the Parish of Britley.

Shaw's Pa-
rish Law,
228. cites
S. C.

2. If one be *retained* in service only, the law does not unsettle such person. 2 Shaw's Pract. Just. 52. cites Dalt. 98.

3. 3 & 4 W. & M. cap. 11. S. 7. Enacts, that if any *unmarried person not having child or children shall be lawfully hired into any parish or town, for one year, such service shall be adjudged and deemed a good settlement, though no such notice in writing be delivered and published as therein before required.*

4. One being placed with a barber, to be instructed to shave
and

and make a bob-wig, for a twelvemonth, and to be found in clothes by the barber, and the barber to have what he earned; if this would gain him a settlement within the statute of W. & M. was the question. Per Cur. without any difficulty it will gain him a settlement. It was objected that he is not an apprentice by indenture, as he ought by the last statute; and he is not a servant, but rather his master is a servant to him, for he gave him 6l. for his instruction; non allocatur. But ruled that he had gained a settlement. Skin. 671. Mich. 8 W. 3. B. R. The King v. the Town of Chesterfield.

2 Salk. 479. pl. 28. The case of Chesterfield, S. C. The covenant was between the master of the pauper and the barber, to which the pauper was

no party. And adjudged, that this did not make a settlement at Chesterfield; because it was no service, and that the pauper was thereby no more than a boarder there for his education, which is no service to make a settlement. Trin. 9 W. 3. B. R. Comb. 445. Trin. 9 W. 3. Jerrison's case, S. C. And per Cur. it makes no settlement; for he was there only for his education, and was not under any obligation to serve the barber. 3 Mod. 328. Hill 8 W. 3. The King v. Chesterfield, &c. S. C. says, that in Easter term following, the Court held it no good settlement there. 12 Mod. 132. The King and Jerrison and Chesterfield, &c. S. C. accordingly. Caith. 400. CHESTERFIELD V. WALTON HAMLET, S. C. accordingly. For here was no reciprocal contract between the boy and the barber, and he was not obliged to stay in the barber's service, and was in nature of a scholar, and not of a servant. Dalt. Just. cap. 73. cites S. C. Shaw's Parish Law, 234. cites S. C. Nelf. Just. 545. cites S. C.

5. 8 & 9 W. 3. cap. 30. S. 4. Recites, that whereas some doubts have arisen touching the settlement of unmarried persons, not having child or children, lawfully bired in any parish or town for one year. Be it therefore enacted, and declared, that no such person so bired as aforesaid, shall be adjudged or deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the same service during the space of one whole year.

A question was made upon this act, whether it extended only to cases that might happen after the act, or to such also

as had happened? And per Cur. to such only as may happen after the act. It can have no retrospect, but declares a law for the future, notwithstanding the words declared and enacted; adjudged on a special order. 2 Salk. 525. Trin. 11 W. 3. B. R. Parish of Beckenham v. Camberwell. 12 Mod. 234. Mich. 20 W. 3. B. R. S. C. by name of the King v. Camberwell. Poor's Settlements, 180. pl. 225. cites S. C. Nelf. Just. 545. cites S. C.

The Court was moved to quash an order of quarter-sessions, wherein the case was specially stated, and was only this, (viz.) after the 3 & 4 W. & M. cap. 11. and before the 8 & 9 W. 3. cap. 30. A man was bired for a year, and served only half a year, which the justices had adjudged a good settlement, and the Court was of the same opinion without argument; for they held, that the words enacted, and shall continue, &c. in the 8 & 9 W. 3. cap. 30. shew that that clause is not to be extended to precedent hirings. And Eyre mentioned a case between the inhabitants of Becknam and Camberwell. Trin. 11 W. 3. wherein it had been so adjudged. And Pratt Ch. J. said, that to make the said clause to have retrospect would introduce great inconveniencies. MS. Cases. Mich. 5 Geo. B. R. The Inhabitants of Barnwood v. the Inhabitants of Bodington.

6. Jerrison lived with Sir Paul Jenkinson as his footboy for three years, without any certain retainer or wages. Per Holt Ch. J. the service to Sir Paul Jenkinson for one year, as his footboy, seems to be a good settlement, though he had no wages; and though not hired for any certain time, but at will and pleasure. Comb. 445. Trin. 9 W. 3. in B. R. Jerrison's case.

7. Bridget Baily, before the 25th of March 1695. was a settled inhabitant in the parish of Overton in Hampshire; and then about the 25th of March, she contracted with John Orpwood of Steventon for 20s. to serve him from the said 25th of March to Michaelmas following, which she accordingly did; and then she made a new contract with him, to serve him for a longer time, by

3 Salk. 257. S. C. accordingly. Poor's Settlements, 255. pl. 295. cites S. C. Just. Case Law, 242.

cites Black. 242. S. C. by name of Stevenfon v. Overton. Dalt. Just. cap. 73. cites virtue of which she served him for a longer time, from Michaelmas till April following; and it was held, that though there was not an entire contract for a twelvemonth, yet there being a service for a twelvemonth, it gained her a settlement according to the 9th W. 3. cap. 30. 12 Mod. 224. Mich. 10 W. 3. Bridget Baily's case.

S. C. S. C. cited MS. Cases as adjudged HILL. 10 W. 3. by name of the King v. the Parish of Overton and Staverton. And Eyre J. as to this case said, that it was upon the point of service for a year. And a question upon a fact before the 8th & 9th W. 3. And a service before this act for 40 days was sufficient; for per Cur. this act was made to end the service for 40 days only, and does not alter any thing as to the hiring. S. C. cited 10 Mod. 393. Trin. 3 Geo. 1. B. R. in case of the parish of Norton v. . . . as the case of Overton v. STREPLETON. And says, that though it was resolved, that this was a settlement, notwithstanding the service was not subsequent to the hiring; yet still it was held necessary, that there should be a service for a year, and hiring for a year. S. C. cited by Parker Ch. J. 10 Mod. 287. Hill. 1 Geo. B. R. in case of the [391] Parish of Brightwell v. the Parish of Henley. S. C. cited and allowed MS. Cases. Hill. 4 Geo. B. R. in case of the Inhabitants of Ivinghoe v. the Inhabitants of Soalbury.

So where a woman was a covenant servant first for half a year, which time she served, and then for another year, and served half of that. The question was, whether this was a service for a year within the new statute? And Rokeby, Turton and Gould J. (absente Holt Ch. J.) held that it was; because the statute designed only that the party should serve a year. Ld. Raym. Rep. 426. Hill. 10 W. 3. Inhabitants of South Moulton in Suffolk. S. P. For here is a hiring for a year, and service for a year, though not under that hiring. And a person of that strength, as to be hired for a year, is not esteemed by the act a person likely to become chargeable, but able to maintain himself by his bodily labour. 10 Mod. 390. Trin. 3 Geo. B. R. in case of South-Sidenham v. Lamerton.

But where one was hired as a servant to live at Ridgwick for half a year, and after that was hired again to live there another half year with the same person, and thereupon served a year in one continued entire service, but by several hirings, per Curiam, it ought to be one entire contract, and one entire service; the one is required by the statute as well as the other; for if a service under several contracts shall gain a settlement, then one who serves by the month, by the week, or by the day, may if he continues a year gain a settlement. 2 Salk. 535. Mich. 9 Ann. B. R. The Parish of Dunsfold v. Ridgwick. There must be one entire contract, and the service must be for an entire year with the * same person as the contract was made with. MS. Cases. Mich. 9 Ann. B. R. S. C. by name of the Queen v. the Inhabitants of Dunsford and Ridgwick. — Nelf. Just. 545. cites S. C. — Just. Case Law, 241. cites S. C. — Shaw's Parish Law, 231. cites S. C. — Black. 296. S. C. — S. P. Poor's Settlements 2. pl. 2. Mich. 1610. B. R. The Parish of Rudwick v. Chedingford, where Ld. Parker and Curia held, that the original contract must be for a year. — 2 Shaw's Pract. Just. 55. cites S. C. — S. P. Dalt. Just. cap. 73.

* But see Infra, pl. 20 & 31.

So where J. S. the 19th of February 1710. came from Shipley to Easthead in Horsham, and bargained with him to serve him till May-tide for 1s. per week, and at May-tide he bargained to serve him till Lady Day next for 26s. wages, and at Lady Day agreed to serve him till May-tide next at 3s. per week, and at May-tide he agreed to serve him till Lady Day next for 26s. and then till May-tide next at 3s. and then he staid a fortnight at 1s. a week; and the question was, whether this J. S. gained a settlement by his hiring and service? The Court of Sessions held he did, but the Court of B. R. were of opinion that he did not; for they said, the hiring and service must be for a year; and the order of sessions was quashed. Foley's Poor Laws, 134, 135. Mich. 12 Ann. B. R. Horsham Inhabitants v. Shipley Inhabitants.

So if a servant is hired from week to week through the whole year, and then is hired for a year, but serves only a week; this is no settlement, for want of continuance 40 days in the service after the second hiring. 10 Mod. Hill. 1 Geo. B. R. in case of Brightwell and Henley Parishes.

But where a servant three weeks after Michaelmas was hired till Michaelmas following, and at Michaelmas he was hired for a year, until next Michaelmas, but did not serve out the year; but his service in both years was above a year. The question was, whether this was a settlement; for though here was a hiring for a year, yet it was not a year's service subsequent to that hiring. Per Parker Ch. J. the rest concurring, it is a settlement; for here is a hiring for a year, and a service for a year, though not under that hiring, which was resolved not to be necessary in the case of Overton v. STREPLETON. 10 Mod. 287. Hill. 1 Geo. B. R. The Parish of Brightwell v. the Parish of Henley. Foley's Poor Laws, 143. S. C. by name of Brightwell Parish v. the Parish of West Hally.

So where T. about 14 years since was hired for a year to W. at Aynhoe, and served him the same year, and received his year's wages, and afterwards, at Mich. 1725. went to P. at Biffiter in the county of Oxon to be hired, who told him he could not hire him then, because he expected a man in three weeks, but if the said T. would supply the place of such man till he came, then the said P. would pay him for his time, whereupon the said T. entered into the service of the said P. and lived there till Christmas following, and then was hired to him, and served him at Biffiter till Michaelmas then

then following, and then at Michaelmas 1726. he was hired at Biffiter afore said, to his said master P. for a year, and staid in such service till Midsummer following, and no longer. It was argued that the said T. was settled at Biffiter, because, though the statute requires a hiring for a year, and a service for a year, it does not require that the hiring and service should be under one and the same contract, and the case of BRIGHTWELL AND WESTHANNING was cited, and relied upon as the very case in point, where it was resolved and settled. Hill. 1 Geo. 1. B. R. when the Earl of Macclesfield was Ch. J. And the Court upon the authority of that case held, that these hirings and service did make a settlement; for he was hired for a year, and served a year. And thereupon an order of justices, and another of the quarter-sessions was quashed. Ld. Raym. Rep. 1512. Mich. 1 Geo. 2. B. R. The King v. the Inhabitants of Aynhoe.——Foley's Poor Laws, 144. S. C. accordingly. But Raymond Ch. J. and Page J. declared, they thought that the parliament meant that the hiring should be for a year, and the service for the same year; and had it been a case *primæ impressionis*, they should have adjudged it so.

8. A single man is hired for a year, and about a month before his year is up, he marries, and serves up his year, and the question was, whether this hiring and service shall acquire a settlement within the late act of parliament? [but no resolution.] Freem. Rep. 518. pl. 693. Mich. 1702. Anon.

In such a case, Holt and Gould held, that the word (unmarried) went only

to the hiring; but Powel contra, that it went to the whole service by reason of the word (such.) 2 Salk. 529. Pasch. 2 Ann. B. R. The Parish of Farrindon v. Walcot.——Nels. Just. 545. cites S. C.——2 Shaw's Pract. Just. 53. cites S. C.——2 Salk. 527. Pasch. 1 Ann. B. R. S. C. by name of the parish of FARRINDON v. WITTY, where Powel J. inclined that the words (such service) goes to all, not only to the stay, but to the state of the party. But Holt J. contra. that (such) is only (such service) and the marriage does not hinder the service, the contract continues; and suppose the woman he marries be of the same parish, shall not that gain a settlement? Just Case Law, 242. cites S. C.——Dalt. Just. cap. 73. cites S. C. Shaw's Parish Law, 229. cites S. C. Poor's Settlements, 181. &c. pl. 226, 227. cites S. C.

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In such a case Powis held, that the words (such person) in the act intends only an unmarried person, at the time of the hiring. And per Powel, a servant is not restrained from marrying. And per Cur. it gains a settlement. Poor's Settlements, 45. pl. 69. Pasch. 1712. B. R. The Parish of Ordenham v. Henden in Middlesex.——2 Shaw's Pract. Just. 56. cites S. C.——Shaw's Parish Law, 232. cites S. C.——S. P. For the statute does not say he shall continue so all the year; but says, unmarried at the time of the hiring. Poor's Settlements, 54. pl. 77. St. Saviour's v. St. Lionell, Backchurch.——2 Shaw's Pract. Just. 56. cites S. C.——Foley's Poor Laws, 147, 148. Mich. 1 Geo. B. R. S. C. by name of ST. SAVIOUR'S v. ST. DIONIS BACKCHURCH. And says, that so it was resolved. Hill. 11 Ann. between Henden in Middlesex, and Aldenham in Hertfordshire. S. P. And the Court held, that the hiring for a year, and service for that whole year, though the servant married before his year was out, gained him and his wife a settlement in the parish where he served. Foley's Poor Laws, 148, 149. between the Parish of Clent in Com'. Stafford, and the Parish of Elmley Lovet in Com'. Wigorn.

9. Another question was, whether a *curate*, that is hired for a year, shall thereby acquire a settlement as a hired servant? The justices of Buckinghamshire differing in their opinion, it was referred to the Ch. J. for his opinion in his chamber. Freem. Rep. 518. pl. 693. Anon.

10. If a man hires a servant, and bargains with him that he shall come within a day of Michaelmas, and then says, he agrees not for a year, yet this contract shall be taken for a year; for it is an apparent fraud to evade the statute. Poor's Settlements 2. pl. 2. Mich. 1710. B. R. Per Ld. Parker in the case of the Parish of Rudwick v. Chedingford.

2 Shaw's Pract. Just. 55. cites S. C. MS. Cases. Mich. 9 Ann. B. R. S. C. by name of the Queen v.

the Inhabitants of Dunsford and Rudgwick. Shaw's Parish Law, 231. cites S. C. It was adjudged that a hiring 10 days after Michaelmas as from that Michaelmas till the following is no good settlement; for the hiring must be for a year, and the service for a year. Dalt. Just. cap. 73. S. P. cited by Eyre J. MS. Cases, pl. 41. Mich. 9 Ann. B. R. in case of the Queen v. the Inhabitants of Dunsford and Rudgwick.

So where a poor man was hired on a Saturday, Michaelmas being the Thursday before, to serve him from the said Thursday to Michaelmas following. The question was, if this gained a settlement? Pract Ch. J. held, it did not; for how can one be said to serve a man from a day that

is past? there must be a hiring first, and a service pursuing that hiring; and Powis and Fortescue J. accordant. And afterwards, in the same term, the order was quashed, and that it gained no settlement. Poor's Settlements, 88. pl. 120. Hill. 1718. Anon. S. P. Shaw's Parish Law, 287.

So where A. was hired the 3d of October to serve till Michaelmas following, and at Michaelmas, the master says, *pay a day or two and I will pay you.* The justices at sessions, adjudged him settled according to the hiring. The order being recited specially, and brought up to the King's Bench, it was moved to quash it; for that the justices have erred in point of judgment, they having adjudged that a man may gain a settlement, although he does not serve a year. The statute says expressly, there must be a hiring and service, which is not in this case, and no fraud appears upon the face of the order which ought to appear, or else the Court cannot adjudge it to be so. Mr. Reeve contra. At this rate there would be no such thing as a settlement, every person would hire a servant two or three days after quarter-day purely to evade the statute. Per Cur. the justices confirming the order imports a fraud; and adjudged accordingly. Poor's Settlements, 56. pl. 80. Mich. 1714. B. R. Pepper Harrow v. Frencham. 10 Mod. 293. Pasch. 1 Geo. B. R. S. C. by name of FRENCHAM v. PEPPER HARROW. Adjournatur. But the Reporter says, that afterwards (ut audivit) it was held no settlement. Foley's Poor Laws, 135, 136. Pasch. 1 Geo. B. R. S. C. says, that upon consideration the Court were all of opinion, that this hiring was not sufficient to gain a settlement; for it is not a hiring for a year within the act of 3 & 4 W. & M. And if we once go out of the act where must we stop? And the order of sessions was quashed. S. C. cited 10 Mod. 392. Trin. 3 Geo. B. R. in the case of the Parish of Horton v. And says, that it was held to be no settlement.

11. Before the late act, the service of a servant by 40 days was a settlement. MS. Cases. Trin. 9 Ann. B. R. Parish

*[393] in Derby.

2 Shaw's
Pract. Just.
55. cites S. C.
Shaw's Pa-
rish Law,
231. Hill.
1710. 8. C.
Foley's
Poor Laws,
231, 132.
Trin. 10
Ann. B. R.
Anon. seems

12. A poor man having a daughter, who was married, and had gained a settlement elsewhere, hired himself for a year, and served the year, and per Cur. he is a single person, within the meaning of the act, though not expressly within the letter of the act. The meaning of the statute was, that he might not bring any consequential damage to the parish, which he cannot possibly do here; and held the man, notwithstanding * he had a child, gained a settlement, by virtue of the service. Poor's Settlements, 5. pl. 7. Pasch. 1711. B. R. The Parish of Antony v. Cardigan.

to be S. C. S. C. And though it was objected, that this act of 3 & 4 W. & M. was an explanatory act of 2 Jac. and so ought to be taken strictly according to the letter; yet it was held, that these acts being for the settlement of the poor, the judges ought to have regard to the meaning of the law-makers. The scope of the act was to prevent a charge to the parish, and if a man were in such a state, as that he would not draw any charge after him, he was within the meaning of the act, though the letter of the act was to the contrary. His daughter being provided for, and settled, he is a person unmarried, not having a child as to this purpose. The child is secured from the father, and it is as if she were dead. Where the party's settlement will not draw after him the settlement of his children, he may gain a settlement without notice. MS. Cases. Trin. 10 Ann. B. R. The Queen v. St. Anthony and Cardinnam in Cornwall, S. C.

13. 12 Annæ, cap. 18. S. 2. Persons coming with certificates into parishes, and hiring servants, such servants shall not gain any settlement by such hiring.

Foley's
Poor Laws,
242, 143.
Trin. 13
Ann. S. C.
by name of
the parish
of Jessop v.
Missenden
in Bucks;
and says,

14. S. B. spinster lived a hired servant at Chesham a whole year, and after went and lived with her father, a cottager [in Messington] and was hired for a year, and her father was to give her 10s. a year, and make what vails and profits she could; the justices at the sessions held, she was settled at Chesham, and that her hiring with her father was a fraudulent hiring, and not within the meaning of the act of parliament. But the Court held, that she was settled in Messington, and that her father might well hire her.

her. Poor's Settlements, 34. pl. 54. Trin. 1714. B. R. the Court held, that there was no ground of fraud; for it was to live with her father, who might be grown old.

15. A servant was *hired at A. for a year, his master lived there half a year, and then lived at B. another half year* It was held, that the servant was settled in the last place; for the identity of the service is the same; and the statute does not tie it down to one place. If the master had removed to several places, the last place where he lived 40 days gains him a settlement, agreeable to the statute of King Charles. Poor's Settlements, 16. pl. 23. Trin. 12 Ann. B. R. The Parish of Ashton v. Silverton in Northamptonshire.

S. P. a Shaw's Pract. Just. 55. Shaw's Parish Law, 232. cites S. C. A servant maid was hired for a year to a substantial farmer in

the parish of *Ashton*, where she served half a year, then her master, and she with him, removed to the parish of *Patshall*, where her master took another farm; the servant continued with him in the parish of *Patshall* for the other half year, and now is likely to become chargeable; and the justices of peace send her from *Patshall* to *Ashton*; *Ashton* appeals to the sessions, and they make an order to send her to *Silverton*, which was the place of her settlement before; so that now the question is, whether she gained any settlement in any of these places? If she did, in which of these places? It was much insisted on, that the service for the year ought to be in the same place. Ch. J. Parker said, sure, this is no new case; before the statute of 13 & 14 Car. 2. cap. 12. no person was removeable; then comes that statute, and says, it must be before 40 days expire; for if they live these 40 days, according to that act of parliament, they gained a settlement; then comes the statute of 3 & 4 W. & M. cap. 11. and says, such 40 days must be reckoned from a notice in writing, which notice in writing must be published in the church; now that extended only to such as were removeable; but a servant as came in with his master, was not removeable; then that act goes on, and makes a further provision, as if any person being unmarried, &c. [See pl. 3.] Now as it stood upon this act, there was a quære, what was the meaning of such service? Whether such service should relate to the contract, which was for a year, or to the 40 days? Then came the statute of 8 & 9 W. 3. cap. 30. S. 4. which enacts, that no person so hired shall be adjudged to have a settlement, unless he continues in the service a whole year. Now by this clause it plainly appears, that the service was to relate to the contract, and to prevent persons running away from their service; but it cannot relate to the 40 days; for that stands upon the statute of 13 & 14 Car. 2. So that if a person is hired to the master in one parish, and he goes with his master, and there continues for 40 days in his service, and serves his master for one whole year, the parish he continues last in for 40 days, before the end of his year, is the place of his settlement; but if he runs away from his master, during the space of that year, he gains no settlement at all; and the reason why the 40 days gains a settlement is, because he comes there with his master; and you cannot remove him or her from his or her master; and therefore being once settled so as he or she cannot be removed, that is accounted a settlement: and there was a case to this purpose, adjudged between the parishes of *EDGEWATER* AND *HARROW*; there the case was, a copyholder had 25s. a year of his own for life, where he lived; he had several children, and dies; his wife was admitted for life, and dies; [394] the children were like to be chargeable; and whether they could remove them or not was the question; and it was held they could not; because they being once settled, could not be removed; besides, we all pretty well know the history of the act of 8 & 9 W. and that it was made to end the dispute; for this Court, always before this act, looked upon such service to be 40 days service; and now by this last clause, it is for a year. Besides, here is what the act requires, which is a hiring and service for a year; and it would be the hardest case in the world for servants who come with their masters to town, and live half a year in town, and half a year in the country, and they by this rule would gain no settlement: so that the whole Court were all of opinion, that the orders should be quashed, and that *Patshall* was the place of her last legal settlement. *Foley's Poor Laws*, 188, 189, 190, 191, 192, 193. Trin. 12 Ann. B. R. between the Parishes of *Silverton* and *Ashton* in Com'. Devon.

There was an order made by a justices of the peace to remove one *Langley*, his wife and daughter, from *Bishop's Hatfield* to *St. Peter's* in *St. Alban's*. Upon an appeal the matter was stated specially, viz. That this *Langley* was a *huntsman* to one *Mr. Arnold*, and that *Mr. Arnold* lived sometimes at *Westminster*, and sometimes at his house in *Northamptonshire*, but that *Mr. Arnold* had no settlement in *St. Peter's* in *St. Alban's*; but that this *Langley* served the last 40 days of his year in the parish of *St. Peter* in *St. Alban's*, with his master *Mr. Arnold*, which the justices at sessions thought gained no settlement for *Langley* there; and quashed the order of a justices: but this Court, upon the order's being removed by certiorari, quashed the order of sessions, and held *Langley's* settlement is in *St. Peter's* in *St. Alban's*, by serving his master *Mr. Arnold* the last 40 days

days of his year there, *though his master Arnold had no settlement there.* Foley's Poor Laws, 197 198. Hill. 1 Geo. 2. in B. R. between the Parishes of Bilhop's Hatfield and St. Peter in St. Alban's Hertfordshire.

16. A poor man *hired himself to a warrener, and lived all the year [except] 8 weeks, during which time he lay at a lodge.* And it was held per Cur. 1st, That that was no interruption of the service. 2dly, The statute only intended an identity of service quoad the master, and not quoad the place; and therefore *wherever he lived the last 40 days, it is a settlement within the 14 Car. 2. Poor's Settlements, 55. pl. 79. Mich. 1714. Eldeston Parish's case.*

17. A servant hired, and *serving a master in a place where the master has no settlement,* will be good; for the service is personal, and wherever it is performed, that will be sufficient to gain a settlement. MS. Cases. The Queen v. Filleigh and Chittlehampton in Devon.

10 Mod.
261. Mich.
1 Geo. 1
S. C. by
name of the
parish of
PAWLET V.
BURNHAM
parish, says
the Court
quashed the
order, and
held that an
actual ser-
vice for a
year was
necessary.

18. J. P. lived as a hired servant at Spawling for a year, and after was *hired at Burnham by covenant for a year, and lived there all but 3 weeks, when he voluntarily parted from his master, who deducted 3 shillings of his wages.* The justices adjudged him settled at Burnham. The order being returned into B. R. it was objected that the justices erred, in adjudging him settled at Burnham, having not served a year. To which it was answered, that it is said he was a covenant-servant, which ex vi termini does import by deed, and then his going away cannot discharge the covenant. Per Cur. here is no manner of fraud expressed, or appearing by a necessary implication; it is not within the words or meaning of the act. Can a man compel his servant to gain a settlement nolens volens; for whose advantage is it, the servant's or the master's? As to the covenant, that it was by deed, and so the service continued, perhaps he might bring covenant, and as to that point the service continued, but not quoad the settlement, where the statute says he must serve for a year, which is not in this case. Poor's Settlements, 61. pl. 84. Spawling v. Burnham.

Poor's Set-
tlements,
78. pl. 104.
S. C. by
name of the
parish of
Horton v.
Houghton
in Stafford-
shire. Ad-
journatur.—
10 Mod.
392. S. C.
adjournatur.
In a MS.
which I
have of this
case it is
said, that
*[395]

19. Two justices of peace made an order of removal of one John Evans and Anne his wife, from the parish of Ranton to the parish of Haughton; upon appeal to the sessions they were of opinion, that the order of 2 justices ought to be confirmed, but found the matter specially, which was as follows, that the said John Evans, *about 5 years ago, was hired with Ralph Thrubshaw of Haughton aforesaid, from Ash Wednesday till Christmas, and served him that time; then he went away from him, and stayed with his father in Ranton aforesaid for about a week; then he returned to the said Ralph Thrubshaw, and was again hired with him for 11 months, and served him the said 11 months, and then departed from the said Ralph Thrubshaw, and took his clothes with him, and was absent one week; then he returned to the said Ralph Thrubshaw, and was *hired with him for 11 months, and accordingly served him, and then left that service, and went to his father in*

in Ranton, and stayed about one week; then the said John Evans served one John Sutton of the said parish of Haughton for about 3 weeks, then returned to Ranton aforesaid, and stayed for about a week, and then returned to the said John Sutton to the said parish of Haughton, and hired himself for 11 months, and did accordingly serve within a fortnight or 3 weeks of the last 11 months, where, by agreement of the said John Sutton, to avoid a settlement in the said parish of Haughton, he left him, took his clothes, went into the parish of Gnosall, and there continued about a week; then the said John Evans returned to the said John Sutton, and continued with him so long as to make up his service for the 11 months; and 3 weeks before Christmas the said John Evans hired himself again to the said John Sutton for another 11 months, and served him from that time till within 3 weeks of Michaelmas following, and then came away and married. *Quære* was, whether these several hirings were sufficient to gain a settlement in the parish of Haughton? It was insisted, that here was neither a hiring or a service for a year, cited several cases, and concluded, that John Evans, by these hirings and services, could not gain a settlement in Haughton. It was said on the other side, that the statute that required the hiring for a year, was an explanatory statute, and therefore ought to be taken strictly, and that there was no fraud, because it was a mutual agreement between master and servant, and that they might make such an agreement. It was then objected, that this was *fraudulent, and intended to evade the statute*; and that the hiring of servants ought to be a year; and that if the hiring was general, the law would make it a year, and cited Coke Litt. 42. Ch. J. Parker said, this was an apparent fraud, and different from all the other cases; Pratt J. said he doubted they must take the law to be, that there must be a hiring for a year, and a service for a year. Here the sessions have found it specially, and there is neither hiring or service for a year. And suppose a man that lives in a parish incumbered with poor, hires a servant for 11 months only, to * prevent his gaining a settlement, how can this hiring and service gain a settlement? And as to the fraud, if there is any, the justices of peace are judges of that. Eyres J. of the same opinion with Pratt J. Powis J. absent, propter ægritudinem. Afterwards in Easter term, after long debate and consideration, the *opinion of all the Court was, that these hirings and service in the parish of Haughton, were not sufficient to gain a settlement*; so the orders were quashed. Foley's Poor Laws, 137, 138, 139, 140, 141. Trin. 3 Geo. B. R. between the parish of Ranton and the parish of Haughton in Com. Stafford.

in Hill. 4 Geo. B. R. it was resolved after several arguments, and long deliberation, that a hiring for 11 months, and service accordingly, does not gain a settlement; for the statutes of 3 & 4 W. & M. cap. 11. S. 7. and 8 & 9 W. 3. cap. 30. S. 4. require a hiring and service for a year, and that it had been several times so resolved; and that tho' such hirings as in this case do defeat settlements, yet that is a mischief fit to be remedied by the legislature, and not by the Court, which is to judge upon the law as it is. — * Pratt J. said he did not see but that if such agreement was made purposely, by way of caution, to prevent a charge upon the parish,

the intent was lawful, and we have nothing to do with it. 10 Mod. 392. in S. C.

20. A poor man was hired to one K. who rented a farm in Ivingoe, and lived half a year; the master assigned the farm to another, the servant lived the rest of the year with the other person in the farm, and at the end of the year received his wages of the second

2 Shaw's Pract. Just. 56. cites S. C. — Shaw's Parish Law,

233. cites
S. C.—
In a MS.
which I
have of this
case, it is
said, that
the first
master paid
the said ser-
vant half
his wages,
but said no-
thing to dis-
charge the
contract, nor
was there
any bargain
between the servant and the assignee, but the servant continued upon the farm, and served the assignee as shepherd during the other half year, at the end whereof the assignee paid him the other half of his wages, and gave him 5s. over for reaping. And the question was, whether this hiring and service gained the man a settlement at Ivinghoe? And per tot. Cur. they did, because nothing appearing to dissolve the first contract, the whole service was performed by force of it, and was strictly and properly the same service as the 8 & 9 W. 3. cap. 30. S. 4. requires, &c. MS. Cases. Hill. 4 Geo. B. R. S. C.

*[396]

second master; and if this made a settlement was the question? Per Cur. the act says there must be a hiring for a year, and a service for a year, which is done in this case with another person: the question will be then, if it shall be deemed the same service? Here is no new contract. Per Pratt, if a master commands his servant to live with another for a certain time, it is a service to first master; and here being no new contract, it is carrying on the service of the first master; and compared it to the case of CASTOR AND ECCLES, cited in Salkeld. The subsequent master paying the wages, does not alter the case; for the contract not being destroyed, he might have brought an action against the first master: tota * Curia accordant. Poor's Settlements, 81. pl. 109. Pasch. 1718. B. R. Parish of Ivinghoe v. Solebury in Bucks.

21. Upon a special order the matter appeared thus; J. S. lives in a house that was 2 thirds in the parish of Graveny, and 1 third in the parish of Feversham; the master hires a maid servant for one whole year, and she is found to lodge in that part of the house that is in the parish of Feversham, and the master lodged in that part that was in Graveny. The Court seemed to think the maid's settlement was in the parish of Feversham, where she lodged, but the parties, by leave of the Court, referred it to the judges of the assize. The Reporter says he had been informed by Mr. Marsh, who was counsel in the cause, that the judges of assize were both of opinion that the maid's settlement was in Feversham, in the parish where she lay; and both parties acquiesced under that opinion. Foley's Poor Laws, 198, 199. Trin. 5 Geo. B. R. between the Parishes of Feversham and Graveney, in Kent.

So where
apprentice
was bound
by inden-
ture, &c. to
his master,
who within
two years
afterwards
broke, and
then the
apprentice,
by and with
the leave of
his master,
was hired
in another
parish for a
year, and

served for a whole year there, which service commenced and ended after his master failed. It was admitted by the Court, that where one is bound apprentice by indenture, it cannot be discharged but by deed or by the sessions; and that a hiring after he is bound, or any consequences arising

arising upon such hiring, are entirely void whilst the indenture subsists, and until 'tis defeasanced; for when an apprentice serves 40 days by virtue of the indenture, he cannot gain another settlement, though his master consents, because he had a settlement by the service under the indenture; so there is no colour to set aside an order of sessions, which sent him to the parish where he was an apprentice. 8 Mod. 235. Pasch. 10 Geo. B. R. The Parishioners of Buckington v. the Parishioners of Sevington. Shaw's Parish Law, 235 cites S. C. 2 Ld. Raym. Rep. 1352. S. C.

Where a master took an apprentice, and afterwards ran away, and the apprentice hired himself for a year, and served the year, it was held per Cur. That he gains no settlement, not being sui juris, nor of a capacity to hire himself; otherwise had it been by consent of the master, or had his indenture been cancelled. Poor's Settlements, 115. pl. 155. Pasch. 1724. B. R. The King v. the Inhabitants of Shipton Curry. 2 Shaw's Pract. Just. 57. S. P. Shaw's Parish Law, 234. S. P.

23. A person was hired for a year, and in the year's service the master gave him leave to go to see his mother for one day, and he stayed three days, and then came home again; his master took him into his service, as before. And per Cur. the master's taking him again is a purgation of the offence, and no interruption of the service. Poor's Settlements, 95. pl. 129. Pasch. 1721. B. R. The King v. the Inhabitants of Icelip, Oxon.

If a man lets his servant go to see his friends for a week, or the like, this is no interruption of the service.

Per Lord Parker. Poor's Settlement, 2. pl. 2. Mich. 1710. B. R. in case of the parish of Rudgwick v. Chedingford.

If a servant, after he has made a contract, should leave his master's service for some time, if the master receives him again, according to the contract, he is a servant under the contract, as before. Per Cur. MS. Cases. Mich. 9 Ann. B. R. in case of the Queen v. the Inhabitants of Dunsford and Rudgwick.

24. A servant, 3 or 4 days before his service expired, desired leave of his master to go to a fair to hire himself into another service; but his master absolutely refused to let him go, and told him he should not come into his house again if he went: the servant went notwithstanding, and his master declaring that he should not come into his house again, he did not return till the time of his service expired. And per Cur. this is a settlement notwithstanding, the request of the servant is a reasonable request, and the law will not suffer the master to shew himself so inhuman to his servant. Poor's Settlements, 95. pl. 129. Pasch. 1721. B. R. The King v. the Inhabitants of Icelip, Oxon.

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2 Shaw's Pract. Just. 57. cites Pasch. 1721. S. P.— Shaw's Parish Law, 233. cites S. C.

25. The master turned away his servant a day before Michaelmas, who was hired the Michaelmas before for a year; so that there was a hiring for a year, but wanted a day's service to compleat it. Per Cur. the master cannot turn away his servant to defeat a settlement, his service continues notwithstanding, and held it was a service for a year. Poor's Settlements, 105. pl. 141. Trin. 1722. B. R. The King v. the Inhabitants of West-Horsley.

The master cannot turn off his servant 2 or 3 days before the year expired; if he does, the service in point of law

continues, and he gains a settlement notwithstanding; and so adjudged. Poor's Settlements, 95. pl. 129. Pasch. 1721. B. R. in case of the King v. the Inhabitants of Icelip, Oxon. S. P. Shaw's Parish Law, 237.

26. When a servant continues in the service of a * visitor, he gains a settlement; for he cannot be removed unless the parish shew that he was brought, or came thither on purpose that he might have a settlement, for the statute doth indefinitely, and without any exception, appoint, that where the service is for 40 days, it shall gain a settlement; therefore it shall have a favourable construction in behalf of the poor. Per Cur. 8 Mod. 50. Trin.

The case was, Dr. C's sister lived with him at Christ Church in Oxford and hired a servant for a

year, who was settled in St. Peter's; his sister afterwards went to Fawley upon a visit, and she, with her servant, stayed there above 40 days, and afterwards came back again to Christ Church, being an extraparochial place, where the servant ended his year's service; St. Peter's sent her to Fawley, Christ Church being an extraparochial place. And the Court held she was settled at Fawley, being the last place she lived 40 days in; she could not by law be sent to Christ Church, being an extraparochial place, unless there had been officers to receive her, which they had not at present. Poor's Settlements, 103. pl. 139. S. C. by name of the parish of St. Peter's in Oxon v. Fawley. Foley's Poor Laws, 194. S. C. Nelf. Just. 545, 546. cites S. C. S. P. Just. Case Law, 242. Dalt. Just. 257. cap. 73. Pasch. 1722. B. R. S. C.

* S. P. *So of servant to a scholar.* Per Cur. 8 Mod. 170. Trin. 9 Geo. in case of St. Giles's Parish in Reading v. the Parish of Eversley-Blackwater, &c.

So a servant to a lodger gains a settlement. 2 Shaw's Praet. Just. 56.

Shaw's Parish Law, 235. cites S. C.—Foley's Poor Laws, 200. Trin. 8 Geo. B. R. S. C. by name of the parish of St. Peter's in Oxon v. Chipping-norton.

27. D. was hired in the parish of St. Peter's in Oxford by one who kept a stable of horses at Chipping-Wickham for the London road, and there he served a whole year, and not in the parish of St. Peter's where he was hired. And the Court was of opinion that this man was settled at Chipping-Wickham; for it is the service, and not the hiring, which makes the settlement: and this is a common case; for if a man has lands in two parishes, and keeps house, and lives in one parish, and hath a stock of cattle in another parish, and servants there to look after them, they shall be settled in the parish where they serve, and not in the parish where they were hired, and where their master lives. So an order of sessions which removed him to the parish of St. Peter's, was quashed.

*[398] 8 Mod. 60. Mich. 8 Geo. B. R. The King v. Disney.

Foley's Poor Laws, 146. Pasch. 10 Geo. B. R. S. C. by name of the King v. Whitechapel; but reports it that the man was hired in the parish of Whitechapel, to work at a glass-house there at 10s. per week for 5 years, and was to find himself meat, drink,

washing and lodging; and the order further finds, That he lodged in Whitechapel all the time, except one month. The whole Court were of opinion he gained a settlement in Whitechapel, and confirmed the order.

28. A poor man was hired for 5 years to work at a glass-house in the parish of Ratcliff, from 6 in the morning till 8 at night, but lodged every night in the parish of Whitechapel; this man was removed by an order of 2 justices from Whitechapel to Ratcliff; and upon an appeal to the sessions the order was quashed, the Court being of opinion that he was settled at Whitechapel, because his lying in that parish shewed he was no part of his master's family at Ratcliff, for he might be house-keeper where he lay, and by consequence might be removable, which a servant is not, nor can a journeyman gain a settlement in the parish where he works; besides, it appeared by this order, that he worked only in one special work, and he might serve another after 8 at night in another parish; now both these orders being removed by certiorari, the Court held, that where a man served, and had board-wages, and lay out of his master's house in another parish, he certainly gains a settlement in the parish where he lived and served, and not in the parish where he lay; so the first order was affirmed. 8 Mod. 369, 370. Pasch. 11 Geo. 1726. The case of the Parish of Whitechapel.

If a man hires a labourer, and gives him so much per

29. An order was drawn up specially for the direction of the Court; the words were, *hired as a weekly servant.* The Court said they could not judge what the import of the words was, et nihil

nil factum. Adjournatur. Poor's Settlements, 123. pl. 167. Trin. 1726. B. R. The King v. the Inhabitants of Portsmouth. week, this gains no settlement, because he works but six days in a week. Per Lord Parker & Cur. Poor's Settlements, 2. pl. 2. Mich. 1710. B. R. in case of the Parish of Rudwick v. Chedingford.

30. *A poor man settled at Molesworth was hired by two partners of a boat at Goring for a year, to serve in the said boat, which plied between Goring and London for the year; and whether by the said service the party gained a settlement at Goring, was the question? And per Cur. this is not to be distinguished from the case of a man taken on board a ship in which he served for a year; and there held no settlement is gained thereby; and so it was held in this case, in affirmance of an order of sessions. Gibb. 255. Pasch. 4 Geo. 2. B. R. The parish of Molesworth v. Goring.* Poor's Settlements, 275. pl. 219. cites S. C.

31. *A. was hired to B. for a year, but before the expiration of the first half year B. died, and made C. who lived in another parish, his executor. C. asked, if he was willing to serve him for the remainder of the year? who agreed to it, and served him accordingly in the other parish, at the same wages. Per Cur. adjudged a good settlement; for the service with C. is plainly a continuance of the same contract made with A, and a service for one year in pursuance of the original hiring, notwithstanding the change of masters; and the identity of the service as to the person is not material: and though no case was remembered in point, it was compared to the case of an assignment of a servant. P. 4 G. 1. R. v. the Inhabitants of Ivinghoe; where a master sold his farm within the year, and his servant agreed to serve out his year with the vendee, which was held to be a good service and settlement, and was said to be a stronger case, the vendee there being a stranger; whereas this was the case of an executor, on whom the law casts a privity of contract. And per Wright and Denison J. no doubt the servant might have an action on the original contract against the executor for his year's wages; and if the executor refused to let him serve, it would be a release, and would not deprive him either of his wages or a settlement. Pasch. 15 Geo. 2. B. R. The parish of Ladox v. the Parish of St. Ennedore.*

(N) Orders relating to Settlements by Service or [399] Hiring.

1. **I**F an order says, *he was settled at W. he having lived there for 2 years as a hired servant*, it is well enough. 2 Shaw's Shaw's Parish Law, 199. cites S. C. Pract. Just. 29. cites Trin. 11 Ann. Anon.

To such an order it was objected, that it ought to say, he was hired for a year, and served the year; but overruled. And per Parker, settled there as a servant is sufficient. Poor's Settlements, 28. pl. 48. Trin. 1711. B. R. The Parish of Whidale's case.

2. The order recites, that Abraham Clyson was *intruded into Crowland, being last legally settled in St. John Baptist, having served there one whole year with one J. Diplaw.* It was objected, S. P. MS. Cases. Trin. 10 Ann. B. R. The that

Queen v.
Stondon
and Vidian.

that it did *not appear* upon the face of the order that *he was hired for a year*. Curia: it was said, he was last settled there. The justices need not allege how he was settled there. And it being said, he served a year, the *law presumes* he was hired for a year; as where an order is made for the payment of servants wages, the law presumes it to be for husbandry wages, unless the contrary appears. Poor's Settlements, 7. pl. 11. The Parish of Crowland v. St. John Baptist in Peterborough.

3. Two justices removed a man and his family, *adjudging, that they [he] were last legally settled in North-Fetherwin, in regard they [he] lived there 10 years as a current servant*. It was objected, that it did *not appear there was a hiring for a year*, as the act appoints. Pratt Ch. J. held the objection fatal. Fortescue J. said, the justices have no occasion to give any reason; but if they do give one, and that reason is not agreeable to law, the order is then void. Now for aught appears in this case, the hiring might and might not be for a year. It must appear to be *ipso facto* void upon the face of the order, and so he doubted. 2dly, It was objected, that J. S. and his wife lived as a current servant; whereas the act says, every unmarried person not having wife or children, that comes to inhabit in a parish. Per Cur. it does not appear, that he was married at the time of the hiring; and he might be married after. Adjournatur. Poor's Settlements, 93. pl. 126. Trin. 1720. B. R. The Inhabitants of Eglesbury v. North-Fetherwin in Cornwall.

(O) Settlement by other Things.

1. **W**AN inhabitant of T. came to S. The inhabitants *within 40 days complained to a justice of peace, according to the statute, but did not prosecute it for 5 months*. Quære, whether this was a good settlement that the party could not be removed? Resp. that the party need not be removed within the 40 days, but *it is a disturbance* if complaint be made within that time, so that there be *recens prosecutio*. Quære, what time shall be allowed for the prosecution? Resp. It must be in convenient time; and per Twifden, five months is time enough, but Rainford and Moreton contra; absente Hale. Freem. R. 9. Pasch. 1671. Warren's case.

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Poor's Settlements,
115. pl. 154.
S. C.—S. C.
Ibid. 201.
pl. 243.
Trin. 6 W.
& M. B. R.
by name of
Cowred's
case.—

2. *A woman and 2 children landed at Harwich from Holland, and removing to another place, were sent back to Harwich by the order of 2 justices. Serjeant Darnell urged, that landing makes no settlement. Sir Bartholomew Shower answered, that it was within the equity of the act. Per Eyres J. (absente Holt) you must keep them where you have them for aught I know, it seems to be casus omissus. The order was quashed. Cumb. 287. Trin. 6 W. & M. B. R. Eleanor Conred's case.*

Shew's Parish Law, 225, 230. cites S. C.

3. Taking

3. *Taking up one's freedom* in a corporation, and *voting as a freeman* at the election of bailiffs for the corporation, cannot be taken notice of by the Court, that that implies a settlement; for a bare residence might, by the constitution of the corporation, intitle him to that; and voting is an act that relates to the corporation, and not to the parish. 2 Salk. 534. Pasch. 5 Ann. B. R. The Queen v. the Inhabitants of Buckingham.

Poor's Settlements, 144, 145. pl. 189. cites S. C.—2 Shaw's Pract. Just. 58. cites S. C. Just. Case Law,

239. cites S. C. Dalt. Just. cap. 73. cites S. C. Shaw's Parish Law, 234. cites S. C.

(P) *Orders of Settlement or Removal.* In what Cases the Order must mention a Complaint, and by whom it must be made.

1. **I**T was moved to quash an order of 2 justices of the peace for the settlement of a poor person, &c. because the order recited, that *upon complaint made* concerning the person, &c. they had so ordered, &c. and it did *not appear* by the order *who* it was that *made the complaint*; and the justices of peace have no power to remove any person but upon complaint of the churchwardens and overseers of the poor; and therefore it ought to be so expressed in the order, to give them jurisdiction. To which it was answered, that admitting it to be necessary that it should appear that the order was made upon complaint of the churchwardens and overseers of the poor, yet that defect was *helped by the special return of the certiorari* by the justices in the caption *where it is expressly alleged, that the order was made upon complaint of the churchwardens, &c.* But per Cur. it is absolutely necessary that in the body of the order it should be expressly shewn, that it was made upon the complaint of the churchwardens and overseers of the poor; for otherwise the justices have no authority to make it. And the special caption made upon the return of the certiorari could not help the defect in the body of this order; for that *ought to be sufficient of itself.* Carth. 365. Hill. 7 W. 3. B. R. The Inhabitants of Wotton Rivers v. the Inhabitants of Marlborough in Wilts.

2 Salk. 492. S. C. by the name of the Inhabitants of Weston Rivers v. St. Peter's in Marlborough. Poor's Settlements, 18. pl. 26. S. C. S. P. Poor's Settlements, 29. pl. 44. The Parish of St. George's in Southwark. S. P. Just. Case Law, 244. Nelf. Just. 551. cites S. C. 5 Mod. 149. Hill. 7 W. 3. B. R. S. C. by name of

THE KING v. THE INHABITANTS OF WOOTON RIVERS; where it is said, that complaint must be made by the public officers of the parish, to whom the care of the poor is intrusted by law; and without such complaint the justices have no power to remove the person. 12 Mod. 89. S. C. 2 Shaw's Pract. Just. 22. cites S. C. and says, that it is *not sufficient to say, the order was made on due notice*; without adding (on complaint of the churchwardens and overseers of the poor of the parish.) 2 Shaw's Pract. Just. 23. cites S. C. S. P. Ibid. 26. Dalt. Just. cap. 73. cites S. C. 3 Salk. 254. S. C. Shaw's Parish Law, 195. Mich. 7 W. 3. B. R. S. C. by name of the King v. the Inhabitants of Marlborough.

If all the rest of the parish should complain to the justices, and not to the parish-officers, it would not justify their making an order to remove a man; because the statute directs that it must be made upon the complaint of the churchwardens and overseers of the poor. Arg. 8 Mod. 64. Hill. 8 Geo. 1722. in case of the King v. Gage.

A general complaint is not good; for it *ought to be* upon complaint of the churchwardens and overseers, yet the complaint of a town has been held good; and if the complaint be omitted in the order, it cannot be supplied by any return of the justices; for the Court can take notice only of the order, and not of any superfluous return. MS. Cases.

2. If

S. P. Tho^s
it was men-
tioned to be
made upon
due notice.
Dalt. Just.
cap. 73.
cites S. C.

2. It was moved to quash an order, there being *no complaint*; but it was said, that the words of the order are, *upon hearing the differences, allegations, and proofs*: whether that did not amount to a complaint? And the Court held, that it did not; and so it was quashed. Poor's Settlements, 23. pl. 33. Mich. 1723. B. R. Shagforth v. Northbovey in Devon.

S. C. says,

the order was quashed, because it did not say, that any complaint was made to the justices by the churchwardens and overseers of the parish; for without a complaint the justices have no jurisdiction; and for ought appears *this producing of proofs and bearing allegations might be at the reference by both parishes to the justices, &c.* MS. Cases. Mich. 9 Ann. B. R. The Queen v. the Inhabitants of North-Bovey and Chargford in Devon. Shaw's Parish Law, 194. Mich. 9 Ann. S. C. by name of the Parish of North Berry v. Shugford.

3. There *must appear a complaint* to the justices, &c. *in case of a certificate* as well as in any other case. MS. Cases.

(Q) Orders of Settlement or Removal. *Good or not in respect of the Form or Manner.*

Poor's Set-
tlements,
202. pl. 244.
cites S. C.
Carth. 287,
288. cites
S. C. by
name of the
King v. the
Parishoners
of Hunting-
don; and
says, that
the order
was quash-
ed, as being
informal,
viz. For
that it did
not recite that Lucas was last lawfully settled at S. but only *that he was settled there since he resided at H.*

1. ONE L. was born at W. in Lancashire, and after was settled as a servant at H. in Cheshire, and thence removed himself, and was settled at S. in Herefordshire, where he became blind, and thence returned to W. in Lancashire, whence two justices removed him by order, &c. to H. in Cheshire, and two justices in Cheshire made an order to remove him to S. in Herefordshire. Mr. Cheshire excepted, that the order of Lancashire is faulty, because H. is *not said to be the place of his last settlement*. Per Cur. that order is already affirmed in Court, else the exception was good. The Solicitor General said, he would take Mr. Cheshire's own exception against the order of Cheshire, which has the same fault; and therefore it was quashed. Per Cur. Comb. 218. Mich. 5 W. & M. B. R. Lucas's case.

2. The justices made an order, and adjudged a family to be settled in such a parish; after, at the bottom of the parchment, it began thus; *whereas upon complaint that such a one has intruded, these are to remove; and the justices names were put to the order.* And it was objected that this was a void order, there being *no justices names to the first part*, and *although it was at the end of the order*, yet the last part contained no adjudication. Per Cur. it is well, it being *upon one piece of parchment*, and so refers to the whole. Poor's Settlements, 68. pl. 90. Pasch. 11 W. 3. B. R. Linton Episcopi v. South Morton.

3. If an order be by 2 justices, and so said, their *names need not to be mentioned*. Per Cur. 12 Mod. 336. Mich. 11 W. 3. Anon.

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4. It was objected, that it did *not appear in the order that Shelington was in the county of Norfolk*, but *Norfolk was in the margin*; and the Court held the objection fatal; the difference is between
civil

civil and criminal prosecution: it *must appear that the parish is in the county from whence the person is removed.* 2 Shaw's Pract. Just. 29.

5. The parish of Newington being said to be the place of his *legal settlement*, is well. Per Cur. for how can it be said he was legally settled there, unless he was last settled there? 2 Shaw's Pract. Just. 28. cites the parish of Uppoterce v. Dunfavel in Devon. Poor's Settlements, 66. 68. pl. 89. Pasch. 11 W. 3. S. C. by name of the

Parish of Uppoterce v. Dunswell in Devon. S. P. 2 Shaw's Pract. Just. 29. S. P. Just. Case Law, 245. cites Black. 252. Shaw's Parish Law, 199. cites S. C.

2 Salk. 473. in a note, says it was held, Mich. 3 Ann. B. R. That *legal settlement*, and *last legal settlement* are the same thing; because by every new settlement the precedent is discharged.

6. An order was made by 2 Justices to remove a poor man, *except he finds security to be allowed by them* (i. e. the 2 justices) and it was excepted thereto for that reason. Holt Ch. J. said, they cannot make a conditional order; (or that in case he does not find security then to remove him.) For an order of removal is an adjudication, and *ought to be absolute*. And they have nothing to do with the *security*, for that belongs to the parish, and is *not to be allowed, or disallowed, at the justices discretion.* 11 Mod. 171. Pasch. 1708. Oakham v. Whittlesea Parishes.

7. A complaint was made by the officers of West Woodhay to one justice of peace, and then 2 justices adjudge and remove, and held it well; otherwise, where one justice sets his hand to the order in the absence of the other. 2 Shaw's Pract. Just. 29.

8. Whereas Margaret West with her 6 children *has intruded, and will become chargeable if permitted to abide.* It was urged, that this is uncertain, it may be 5 or 10 years hence. Quashed, Poor's Settlements, 27. pl. 39. Trin. 1711. A. R. Anon.

9. An order was quashed because it *concluded, that the person shall be finally settled there.* Poor's Settlements, 29. pl. 43. Trin. 1711. B. R. The parish of Antony v. Cardigan.

10. The order of 2 justices set forth, that the person removed *was lately settled in the parish of C. &c.* where it should have been last legally settled, &c. and for that reason it was quashed. Dalt. Just. cap. 73. cites 9 Ann. 2 Shaw's Pract. Just. 26. S. C. transcribed from Dalton. Shaw's

Parish Law, 197. cites S. C. Shaw's Parish Law, 242. cites S. C. S. P. Just. Case Law, 144. cites Trin. 5 Ann. 2 Shaw, 156, 157.

11. Exception was taken to an order, that it was *we therefore order him to be conveyed to the town of Hoxden*, where the word (*town*) is not mentioned in the statute, but only (*parish*.) Quære. Poor's Settlements, 24. pl. 34. Hill. 1712. B. R. The parish of Royden in Essex v. Hoxden in Hertfordshire.

12. An order was made to remove a poor person to the liberty of Newton in the county of Wilts (not mentioning it to be a parish) and held well; for it shall be *intended that this was a town stiled by the name of the Liberty*, and the implication is the stronger, because the order mentioned the officers of this Liberty. MS. Cases. Trin. 11 Ann. B. R. The Queen v. the Inhabitants of Shillingford in Bucks.

13. The

13. The justices made an order, which was *to continue till sessions* which was quashed; for they have no such power to make an order (till sessions.) Poor's Settlements, 33. pl. 53. Hill. 1713. B. R. Braiton v. Usley in Leicestershire.

[403] 14. On an appeal the justices *set aside the order of 2 justices for insufficiency*. It was moved, that they should set forth the cause of the insufficiency in the order, but per Cur. it is not necessary, and admitting it is not necessary, yet here is a material objection on reading the order: the order sets forth, *whereas Jane Grey and her child was last settled in Bromley*, and it is not said *she was unmarried*; for by joining her child with her it is a strong presumption that she was married, then she should be sent where her husband was settled; for a woman cannot gain a settlement from her husband during coverture agreeable to the case adjudged Trin. 3 Ann. The parish of SEVENOKES in Kent. Anne Christmas was sent by an order, being born there of the body of J. S. single woman, and quashed it, not saying that she was not a bastard, upon a strong presumption that she was, although the child might have been born after the death of the father. Poor's Settlements, 52. pl. 75. Mich. 1714. B. R. The Parish of St. Saviour's v. Bromley.

15. Eyre J. said, that in an order for the settlement of a woman and her children, the not naming the children is a fault. 10 Mod. 220. Hill. 12 Ann. B. R. in the case of the Queen v. the Inhabitants of Manchester.

16. An order was directed to 2 parishes, and it began with a *whereas a complaint has been made to us, &c.* It was objected that it did not mention by which parish, &c. sed non allocatur; for it shall be intended to be made by those who have reason to complain: then it was objected that they adjudged such a place to be the last legal settlement of, &c. because he served an apprenticeship there, and this ought to be shewn more particularly, &c. whether it was by indenture, sed non allocatur; for the justices need not give any reason; there must be an indenture to make a settlement, and the assigning the cause insufficiently is no reason to quash an order, as it is where an ill reason is given. This is only a setting forth the species of their settlement, as that it was not by renting 10l. per annum, or otherwise. MS. Cases. Trin. 12 Ann. B. R. The Queen v. the Inhabitants of Beekly and Wolverhampton.

17. Two justices ordered the carrying back a child illegally brought into a parish, and held good. Just. Case Law, 247. cites Black. 255.

18. A woman and her child are intruded; it was objected that it does not appear but that the child is a bastard. Over-ruled. Poor's Settlements, 108. pl. 145. Mich. 1722. B. R. Parish of Horsham v. Old Fish-Street in London.

19. The order of Wm. Glyn and Jo. Syllly, 2 of his majesty's justices of the peace residing next to the parish church of the borough of Bodmin. It was objected that a borough may have several parishes; but per Cur. the words shew the borough and parish to be but one. And the case of the KING v. MEWS was cited, Hill. 8 Ann.

8 Ann. where it was moved to quash an *order of bastardy*, it not being said that the child was chargeable to the parish but to a hamlet. Per Cur. If it was a hamlet that maintained its own poor it had been good; but this not appearing it was quashed. Poor's Settlements, 112. pl. 150. Mich. 1722. B. R. The King v. Mitford Clerk.

(R) Orders of Settlement or Removal. Good or not, in respect of the *Foundation upon which made, &c.*

1. **A**N order made by the justices of peace was quashed: 1st. Because it was made on an *affidavit* brought to them without the examination of any witnesses. 2dly, Because the defendant was ordered to pay 6l. a sum in gross for the charges that the parish had been at, &c. without shewing how or for what. Comb. 103. Pasch. 1 W. & M. B. R. The King v. Colbert. Poor's Settlements, 150. pl. 197. cites S. C. S. P. Shaw's Parish Law, 167.

2. The order set forth, that *Henry Tate and his wife do endeavour to intrude into the parish of A. and are likely to become chargeable. These are to remove, &c.* It was objected, that here is not a sufficient complaint nor authority for the justices to found this order upon; for they have no power to send a person away by an order, unless he actually has intruded into the parish. But it was answered, that the order says he is likely to become chargeable; and how can he be so, unless he was actually in the parish? Per Parker, the party being poor, is likely to become chargeable, and so is he likely to come into the parish, he endeavouring so to do, as the order says; the words do not import that he is actually come into the parish. And per Cur. the order was quashed. Poor's Settlements, 11. pl. 16. Pasch. 1713. B. R. The Queen v. the Inhabitants of Gruffam.

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(S) Orders of Settlement or Removal. Good or not, in respect of the *Justices by whom made, and how.*

1. **A**N order was to remove a poor man from the parish of *W. to C. in the county of Derby, which was confirmed.* But the first order was now quashed, because it did [not] appear to be made by two justices of the peace; it is only, whereas complaint hath been made to us; and so they did not cite their authority in the order. It is true, they were mentioned to be justices upon the appeal, but that will not help; for they might be so then, and not at the making of the first order; and for this reason it was quashed. 5 Mod. 322. Mich. 8 W. 3. B. R. Walton Parish v. Chesterfield Parish. a Shaw's Pract. Just. 22. cites S. C. Nelf. Just. 550. cites S. C. S. P. Just. Case Law, 243.

2. An

Poor's Set-
tlements,
270. pl. 308.
cites S. C.—
* S. P.
2 Salk. 480.
Trin. 9 W.
8. B. R.
Elizabeth

2. An order was made by two justices to remove a poor person, and exception was taken, that it did *not appear* by the order *that the justices were of the * division, or that either of them was of the quorum*: the last was held a good exception, but the first over-ruled; for in that the statute is directory. 2 Salk. 473. Mich. 8 W. 3. B. R. Anon.

ASHLEY's case. That in this the statute is only directory, and not restrictive or qualificatory.—— 22 Mod. 138. The King v. Ashley, S. C. accordingly; for there may be no justices of the division. Division is not known in our law, but only of counties into hundreds; and by that expression in that statute is meant to go to the next justice.—— 2 Shaw's Pract. Just. 23. cites S. C.——S. P. Ibid. 24.—— 3 Salk. 258. Pasch. 9 W. 3. S. C.——Shaw's Parish Law, 198. cites S. C.——Just. Case Law, 247. cites S. C.——S. P. MS. Cases. Trin. 10 Ann. B. R. in case of the Queen v. Little Horstead, and Petworth, alias Ringmer Parish v. Petworth.

3. *Five justices* of the peace are too many to join in an order for settling of a poor person; for they may well make a majority at the sessions, and so confirm their own order. Per Holt Ch. J. 12 Mod. 559. Mich. 13 W. 3. B. R. Anon.

Poor's Set-
tlements,
272. pl. 311.
cites S. C.—
2 Shaw's

4. An order of 2 justices was quashed, because it did *not appear that they were justices of the county, or for the county*, but only residing in the county. 2 Salk 474. The King v. Dobbyn.

Pract. Just. 23. cites S. C.——S. P. Ibid. 24.——Nelf. Just. 550, cites S. C.——S. P. Dalt. Just. cap. 73.——S. P. Just. Case Law, 243.

5. An order made by the justices of the county of was quashed, because it was *not mentioned of what county* they were, and here are *no relative words*, as of the county aforesaid, or of the said county. MS. Cases. Mich. 8 Ann. Anon.

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6. The port and town of Dover have justices of their own, who removed a family from St. Peter's in Dover to Ash. It was objected, that it did *not appear that the parish of St. Peter's is within their jurisdiction*; but it was answered, that Dover is inserted in the margin, and therefore it must be intended that they have jurisdiction and authority. Per Cur. the justices here have a limited jurisdiction, and a restrained power; and therefore it *cannot be intended* that they have jurisdiction, unless it appears that they have upon the face of the order; and it was quashed for this single objection. Poor's Settlements, 96. pl. 130. Pasch. 1721. B. R. St. Peter's Parish in Dover v. the Parish of Ash in Kent.

(T) Orders of Settlement or Removal. *Quashed* in what Cases in general.

1. **A**N order of settlement of a poor man was made, and afterwards *altered*, and a *re-settlement* made by a *second order*. Per Tremain, this second order cannot be made by law, and therefore the order quashed. Cumb. 66. Mich. 3 Jac. 2. B. R. The King v. the Inhabitants of Studley.

2. Two

2. Two justices made an order of settlement of a poor man in Bedfordshire; two justices of Bedfordshire make an order to settle him in Bucks, the parish in Bucks appeals to the sessions in Bedfordshire; the Court would not *quash the 2d order*, because they had appealed upon it. Cumb. 226. Mich. 5 W. & M. B. R. Swamburn in Bucks v. . . .

Had there been no appeal, the order would be quashed. Comb. 353. The King v. the Inhabitants of St. Giles, Cambridge.

3. Per Northey, it was settled in the case of WOOTON-BASSET, that if the 1st order be naught, no subsequent order on an appeal can make it good. 2 Salk. 482. Mich. 10 W. 3. B. R. Anon. And says that Hill. 11 W. 3. B. R. Same rule was taken by Holt Ch. J. and both orders quashed; and Trin. 2 Ann. the same resolution between SELON AND RIPLEY.

Just. Case Law, 246. cites S. C.—a Shaw's Pract. Just. 24. cites S. C.—Shaw's Parish Law,

195, 196. cites S. C.—Ibid. 240. cites S. C.

(U) Orders of Settlement, or Removal. Quashed in what Cases, for Want of Adjudication.

1. IT was moved to quash an order of 2 justices, which recited, whereas B. is, *as we are credibly informed*, the place of his last legal settlement, not averring that it was the place of his last legal settlement, as it ought; for that the statute says, that the poor person shall be removed to the place where he was last legally settled; and it was quashed. 2 Salk. 473. Mich. 8 W. 3. B. R. The Parish of Trowbridge v. Weston.

5 Mod. 323. Hill. 8 W. 3. S. C. says it should have been upon oath, and being a judgment, ought to be positive and

certain.—a Shaw's Pract. Just. 22. cites S. C.—Ibid. 26. cites S. C.—Nelf. Just. 549. cites S. C.—Dalt. Just. cap. 73. cites S. C.—Shaw's Parish Law, 194. cites S. C.—Ibid. 195. cites S. C.—Poor's Settlements, 244. pl. 284 S. C.

* J. S. is likely to become chargeable, as we are credibly informed. No adjudication; per Parker, it is the belief of another. Poor's Settlements, 27. pl. 38. Pasch. 1711. B. R. Weltham Magna & Parva in Suffex.

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2. Whereas complaint has been made to us, that Elizabeth Fulford, wife of Uriel Fulford, is lately come into the parish of St. Giles, Cripplegate, and is likely to become chargeable to the same; and whereas on oath made by the said Eliz. Fulford, it appears that her husband was last legally settled at Hackney; these are therefore, &c. It was quashed, because there is no judgment of the justices concerning the last legal settlement, but only the oath of the woman. 2 Salk. 478. Pasch. 9 W. 3. B. R. The Inhabitants of St. Giles, Cripplegate, v. Hackney.

S. P. Just. Case Law, 243.—Nelf. Just. 549. cites S. C.

3. Whereas complaint hath been made to us, that J. D. with his wife and children, came from his place of abode and last legal settlement in Berry to Arundel, we therefore require you, &c. Naught; for there is no adjudication of the justices, which was his last legal settlement, but only a complaint that Berry was, which doth not appear whether true or false. 2 Salk. 479. Pasch. 9 W. 3. B. R. Berry Parish v. Arundel Parish.

Poor's Settlements, 257. pl. 298. cites S. C.—a Shaw's Pract. Just. 23. cites S. C.—Nelf. Just. 550. cites S. C.

4. Exception

But where an order was, *whereas upon complaint of the churchwardens and overseers of the poor, that J. S.*

has intruded, and is likely to become chargeable; these are to convey, &c. This was held to be ill, there being no adjudication; for the justices must adjudge themselves. Poor's Settlements, 30. pl. 47. Pasch. 1712. B. R. Parish of Mutton's case.

3 Shaw's Pract. Just. 24. cites S. C.— Shaw's Parish Law, 196. S. C.— S. P. 6 Mod. 163. Pasch. 3 Ann. B. R. The Queen v. Newnham Murray Inhabitants.— An order was thus; *whereas it appears upon the oath of*

4 Exception was taken to an order, that it is *not adjudged that the person removed was likely to become chargeable to the parish; but it is only said that the justices were informed so by the overseers.* Sed non allocatur, because there is no need of any such adjudication; and the order was confirmed. *Ld. Raym. Rep. 513. Hill. 11 W. 3. Inhabitants of Kingston Bowsey v. those of Beddingham.*

5. Exception was taken to an order of 2 justices, because it was only said to be *complained by the churchwardens, that the person removed was likely to become chargeable; but not adjudged so by the justices.* Holt Ch. J. said, that the justices cannot remove a man unless he be likely to become chargeable; for otherwise they might remove a man of an estate: and he took a diversity, that where the order is, whereas it appears to us, &c. on the complaint, and that J. S. is like to become chargeable to the parish, that will be well enough: but where it is as here, whereas complaint has been made, &c. that it is ill. But it was agreed to be referred to the judge of assise. *It ought to appear, that the person removed is a person removeable, and there ought to be a particular averment, that he is likely to become chargeable.* 2 Salk. 491. Trin. 13 W. 3. B. R. The Inhabitants of Suddlecomb v. Burwash.

Eleanor Jones relist of Edward Jones, that she and her daughter Mary were last legally settled in Rockvill, who are likely to become chargeable; these are to remove, &c. It was objected, that here is no adjudication that they are likely to become chargeable. Per Cur. the words, who are likely to become chargeable, are always the words of the justices. If it had been, that they are likely to become chargeable, then it had been a recital only, and the words of the overseers. Poor's Settlements, 15. pl. 21. Trin. 12 Ann. B. R. The Queen v. the Inhabitants of Rockvill.

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Upon a motion to quash an order of sessions upon a settlement, for that it was not in the order, that they adjudged him to be

6. An order was made reciting, that *whereas complaint has been made unto us by the &c. that J. S. who is lately come into the parish of, &c. with a certificate according to 8 & 9 W. 3. is actually chargeable to the parish, and it was quashed; for the justices must adjudge him to be chargeable, or at least must say that it appeared to them that he was so; but the justices need not adjudge the place that gives the certificate to be the place of his last legal settlement.* 2 Salk. 530. Trin. 2 Ann. B. R. Malden v. Fenwick.

last settled in such a place he came from. The Court held it not necessary so to adjudge it; but it not appearing in the order, that he had been chargeable to the parish; but only, that whereas he was likely to become chargeable, the Court quashed it; for by the certificate the parish is bound to receive him, and cannot remove him till he becomes chargeable actually. 11 Mod. 64. Mich. 4 Ann. B. R. The Queen v. Whiten.

Two justices upon information that J. S. was chargeable to the parish of Willerton, and upon its appearing by certificate from the parish of Wadingham that J. S. belonged to that parish, made an order to remove him to Wadingham, without adjudging him actually chargeable to Willerton; and for that reason the order was quashed. MS. Cases. Hill. 4 Geo. B. R. The King v. the Inhabitants of Wadingham in the county of Lincoln. And adds a N. B. This case is within the 8 & 9 W. 3. cap. 30.

7. An

7. An order of two justices was, *whereas complaint hath been made to us by the churchwardens, &c. of A. that B. came to settle in such a parish contrary to law, therefore they ordered to such a place.* And it was quashed for want of adjudication, that he was likely to become chargeable. 6 Mod. 163. Pasch. 3 Ann. B. R. The Queen v. the Inhabitants of Newnham Murrey. S. P. Just. Case Law, 245.—2 Shaw's Pract. Just. 22. cites S. C.—Nelf. Just. 549. cites S. C.

8. The order *must contain an adjudication of the last legal settlement of the party.* 2 Shaw's Pract. Just. 22. cites Pasch. 6 Ann. The Queen v. the Parishes of Langley and Goring. Shaw's Parish Law, 194. cites S. C. by name of the

Queen v. the Parishes of Dangle and Goring. But Mich. 9 Ann. B. R. An order was held good that had no adjudication, but only that it *appeared to the justices that such a one was likely to become chargeable, and that such a place was the place of his last legal settlement.* MS. Cases, pl. 37. Trin. 9 Ann. B. R.

* S. P. 10 Mod. 26. Trin. 10 W. 3. B. R. The Parish of Petworth's case.

The order is sufficient without any adjudication, provided *so much is averred as is necessary to shew the matter within the jurisdiction of the justices.* Per Cur. MS. Cases. Mich. 5 Geo. The King v. the Inhabitants of St. Nicholas, Gloucester, v. St. Clements, Worcester.

9. Two justices sent a person from St. Mary Ottery in Devon to St. Mary's in Bristol, and *that he was last settled there according to their knowledge.* It was objected, that the order should have said that he was last settled there; for an order is a judgment, which *must be certain and positive*, and he might have been settled elsewhere, and they not know it. And it was quashed per Cur. Poor's Settlements, 23. pl. 32. Mich. 1713. B. R. St. Mary Ottery in Devon v. St. Mary's in Bristol.

10. The order run thus: *that J. S. has lately intruded himself, and is likely to become chargeable.* Per Cur. this is no adjudication, but a recital and complaint. Poor's Settlements, 85. pl. 115. Mich. 1718. B. R. The Parishes of St. Nicholas v. St. Clements. In a manuscript which I have of this case, it is reported thus: the

Court was moved to quash an order of removal for want of an adjudication, that the person was likely to become chargeable. The order was to this effect, (viz.) *Whereas upon complaint of, &c. J. S. hath intruded, &c. not having occupied a tenement of 10l. per ann. nor given security, &c. but is likely to become chargeable, &c. therefore we require you to convey, &c.* Reeves, for the order, said, that an adjudication is not required to be made in any one certain form, and that the particle (*but*) shews that the subsequent words are the justices, and not part of the complaint, which begins with the word (*that*) and must in propriety of speech be continued in the same form. Darnel Serjeant contra, that the form of the expression used in the beginning of the complaint is varied in other clauses, which cannot but be construed part of the complaint, as not having occupied, &c. nor having given security, &c. Per tot. Cur. the words (*but is likely to become chargeable*) are plainly part of the complaint, and not the opinion of the justices; and Eyre said, that it had been so adjudged, and desired Darnel to find out the case. MS. Cases. Mich. 5 Geo. B. R. S. C. by name of the Inhabitants of St. Nicholas, Gloucester, v. St. Clements in Worcester.

11. It has been held, that *saying a poor person came to live in a tenement under the value of 10l. per annum, will supply the adjudication of his being likely to become chargeable.* MS. Cases.

See (N) (W) Orders of Settlement or Removal. Quashed in what Cases for Want of Words. And where they shall be supplied by Intendment, or by other Words in the same Order.

Poor's Settlements, 254. pl. 293. cites S. C. Dalt. Just. cap. 73. cites S. C. ——— * S. P. Poor's Settlements, 24. pl. 34. Hill. 1712. Royden Parish in Essex v. Hoxden in Hertfordshire.

1. AN order to remove J. S. was quashed, because it was *not said that he was poor, or * likely to become chargeable to the parish.* 3 Salk. 255. Scrivenham Parish v. St. Nicholas.

S. P. 2 Shaw's Pract. Just. 28. cites Trin. 11 Ann. ———

2. An order was thus: whereas J. S. is *likely to become chargeable*, and did not say to what parish. It was quashed. Poor's Settlements, 27. pl. 40. Trin. 1711. B. R. The Queen v. the Inhabitants of Bradford.

S. P. Shaw's Parish Law, 199. But Poor's Settlements, 108. pl. 145. Mich. 1722. in the case of HORSHAM PARISH v. OLD FISH-STREET PARISH in London, the like objection was made; and Pratt Ch. J. and the whole Court said, it *must necessarily be intended* to the parish where the intrusion was, and the objection was over-ruled.

It was objected to an order, that it is not said, where he is likely to become chargeable, but it was said in the complaint, likely to be there chargeable, but not in the adjudication; but it was over-ruled. The law must of necessity suppose it to be in the same place. Poor's Settlements, 7. pl. 11. The Parish of Crowland v. St. John Baptist in Peterborough.

3. Whereas it *appears (not saying, unto us, &c.)*, ill. Poor's Settlements, 27. pl. 39. Trin. 1711. B. R. Anon.

4. Whereas J. S. and his 3 children have intruded into Petworth, and their last legal place of settlement was in Ringmere, and are likely to become chargeable. It was moved to quash it, because it does *not set forth the ages* of the children; but it was answered, that it is not necessary in this case; for the *order says, they were last legally settled in Ringmere*, and then no matter what their ages are: and the Court was of the same opinion, and so it was not quashed. Poor's Settlements, 28. pl. 41. Trin. 1711. B. R. The Parish of Ringmere v. Petworth in Sussex.

So where an order was to remove Elizabeth Dyke and her 3 children; setting forth, that Elizabeth was the widow of one Abraham Dyke, deceased, settled in Whitechapel. It was objected, that it did *not appear that they were Abraham Dyke's children*; but per Cur. the children are under 7 years of age; besides we will not presume they had another father, in regard their names are said to be Dykes. And the order was confirmed. Poor's Settlements, 94. pl. 178. Hill. 1720. B. R. The Parish of St. Catherine's, Coleman-Street, v. Whitechapel.

5. Whereas J. L. is settled in Wigtown, and is intruded into the parish of A. These are to *remove him and 2 children.* It was objected, that it is *not said (his children)*; for they cannot gain a settlement by reason of their parents, unless said to be theirs; and the next day between BARROW and ENGLEBY the same objection was made, but the Court held it too nice a distinction; for they must necessarily be *intended* to be his. Poor's Settlements, 30. pl. 48. Pasch. 1712. B. R. The Queen v. the Inhabitants of Wigtown in Cumberland.

6. An order was to remove a poor person upon complaint of the overseers and churchwardens of Needham-Market, *that one Sarah Cannum has intruded herself into Needham-Market: and whereas it appears upon her oath, that she was last settled at Quintins St. Mary's; we, therefore, adjudge accordingly: these are to remove, &c.* It was objected, that it * does not appear that Needham-Market is a parish, and the statute expressly says, parish. But Ld. Parker said, the words overseers and churchwardens are sufficient, and make the order good. Poor's Settlements, 10. pl. 15. Pasch. 1713. B. R. The Queen v. the Inhabitants of Needham-Market.

7. It was moved to quash an order of 2 justices for not saying in what county; but note, the clerk of the peace in the sessions order had laid it in Somerset. Per Cur. the clerk of the peace cannot cure a defect in the original order. 2dly, It was objected, that it is not said, that they are justices of the peace, but *coram A. et B. justices of the county*, but not of the peace: but it was said, that the words subsequent *quorum unus* do ascertain that they were justices of the peace. Per Cur. there is a quorum besides in commissions of the peace: and the order was quashed. Poor's Settlements, 19. pl. 27. Mich. 1713. B. R. The Queen v. the Inhabitants of Uplin.

8. *J. C. and S. his wife are intruded, and are likely to become chargeable to the parish of Coln, St. Aldwin's.* It was objected, that this order was void for uncertainty; for it does not appear which of them intruded, and there must be an actual intrusion, but the Court over-ruled the objection. It is *necessarily intended that the wife is where the husband is*; besides the words are, likely to become chargeable, which is impossible from its nature, unless they are in the parish; for otherwise how can they be said to be chargeable? Pratt Ch. J. doubted, *whether an intrusion is absolutely necessary or no*; the likelihood to become chargeable supplies it. Poor's Settlements, 92. pl. 125. Trin. 1719. B. R. Southmason v. Coln, St. Aldwyn's.

MS. Cases. Hill. and Pasch. 5 Geo. S. C. by name of Coln St. Almin's v. Southmason.—So where an order set forth that J. O. is intruded into the parish of Oby, and is become

chargeable, which the justices adjudge. *These are to remove the said J. O. his wife and child to the parish of Linsbury.* It was objected, that the justices have removed more than is complained of, neither does it appear that the wife and child intruded themselves. Per Cur. the intrusion of the husband is by a consequence of law the intrusion of the wife, they are una caro, and cannot be separated, and the settlement of the husband is the settlement of the wife and child. Poor's Settlements, 105. pl. 142. Trin. 1722. The Parish of Oby v. Linsbury. Poor's Settlements, 108. pl. 138. S. C. whereupon the objection they were ordered to shew cause,

(X) Orders of Settlement or Removal quashed in Part. In what Cases.

1. **A**N order of two justices was to remove a man and his two children out of the parish of C. where he might become chargeable, he not having rented a tenement of 10l. a year. And it was held, that saying they might become chargeable was not well; but it should be, that they were likely to become chargeable; S. C. a

Poor's Settlements, 207. pl. 249. cites S. C. Shaw's Parish Law, 194. cites S. C. a

Shaw's
Pract. Just.
22. cites
S. C.

able: but it was held, that saying they had not rented a tenement of 10l. per annum did suffice; but it was held *bad as to the children*; for they are only removeable as persons not settled, and likely to become chargeable, or so young, as they are not able to provide for themselves. And it was quashed as to the children. Farr. 54. Mich. 1 Ann. B. R. The Queen v. the Inhabitants of Caple in Surry.

Shaw's Pa-
rish Law,
199. cites
S. C.

2. *Whereas J. S. has intruded into the parish of A. and is likely to become chargeable; these are to remove him with 3 children*; quashed as to the children; for they have removed more than is complained of. 2 Shaw's Pract. Just. 28. cites the Parish of Up-poterce v. Dunsavel in Devon.

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3. It was moved to quash an order of 2 justices, which was in the form following (viz.) *We do adjudge that J. S. and his family are likely to become chargeable, and that their last legal place of settlement was in, &c.* It was quashed per tot. Cur. as to the family, for the uncertainty; and per tot. Cur. the latter part of the adjudication was held good, and that it had been so adjudged. Mich. 2 Geo. No. 7. And Pratt Ch. J. said, that when the Court hath once given judgment upon any form of expression, it would be inconvenient to give a contrary judgment, because in all probability the justices below regulate the form of their orders by the judgments of this Court, but if the case had been res integra he should have doubted. MS. Cases. Mich. 5 Geo. B. R. The Inhabitants of Sieston v. the Inhabitants of Beeston.

4. An order was made *to remove a woman and her 3 children from H. to M. The father and mother were both vagrants, and the father's settlement not known, but the mother was born at M. and the children at H.* Affirmed as to the mother, but quashed as to the children. MS. Cases. Trin. 11 Geo. Marlton v. Hanning.

Two jus-
tices of the
peace for

the county of Essex made an order for the removal of a man, his wife, and 3 children, without naming them; and the order was quashed as to the children, because he might have more than 3 children, and it would be uncertain which 3 were to be removed. MS. Cases. Mich. 4 Geo. The Town of South-minster v. the Town of Coringham.

6. Two justices made an order *to remove a woman and her bastard child, adjudging them likely to become chargeable, and the last legal settlement of the woman to be, &c.* The order was quashed as to the child, because the place to which they were removed was not adjudged to be the place of settlement of the bastard children, who was to be settled in the place of his nativity wheresoever the mother's was. MS. Cases. The King v. the Inhabitants of Sutton.

For more of Settlement of the Poor in general, see Apprentices,
Bastardy, Certificate-men, Orders, Removals,
and other proper Titles.

* Sewers.

(A) Statutes relating to Sewers, and empowering the Commissioners.

1. 6 Hen. cap. 5. **E**NACTS, that during 10 years commissions of sewers shall be made by the Chancellor, to be sent into all parts of the realm, where shall be needful, according to the form in the act.

* Commis-
sion of
sewers to
defend the
kingdom
against the
sea is very
ancient, and
even by spe-
cial pre-
scription in
some cases;
but sewers
for meliora-
tion of land
are by act
of parlia-
ment. Per
Holt. 12
Mod. 331.

Mich. 11 W. 3. B. R. Vills of Shendrigamy v. Sholedam.

2. 8 Hen. 6. cap. 3. Enacts, that commissioners of sewers shall have power to ordain and execute the ordinances, and other affairs, to be made according to the purport of the commissions ordained by the statute of 6 H. 6. 5. [411]

3. 6 Hen. 8. cap. 10. S. 1. Enacts, that the act of 6 H. 6. cap. 5. and all other authorities, concerning commissioners of sewers, shall endure for ever, and the Chancellor shall have power to grant commissions of sewers to persons named by the Chancellor.

S. 2. The chancellor shall make no commission to any person for the execution of this act, except he have lands of freehold to the yearly value of 20l. or be justice of quorum learned, within the shires.

S. 3. If such commission be directed to any person not having lands, &c. or not being justice of the quorum; such commission, and all presentments before such commissioners, shall be void. This act to continue 10 years, &c.

4. 23 H. 8. cap. 5. S. 1. Enacts, that commissions of sewers shall be directed into all parts within this realm, where need shall require, according to the form ensuing, to such substantial persons, as shall be named by the Lord Chancellor and Lord Treasurer, and the 2 Chief Justices, or by 3 of them, whereof the Lord Chancellor to be one.

“ S. 2. Henry the Eighth, &c. Know ye, that for as much
“ as the walls, ditches, banks, gutters, sewers, gotes, calcies,
“ bridges, streams, and other defences by the coasts of the sea,
“ and marsh ground, being and lying within the limits of A. B.
“ or C. in the county or counties of _____, or in the borders
“ or confines of the same, by rage of the sea, flowing and re-
“ flowing, and by means of the trenches of fresh water descending,
“ and having course by divers ways to the sea, be so disrupt, lace-

“ rate, and broken; *and also the common passages of ships, balengers,*
 “ *and boats of the rivers, streams, and other floods, within the*
 “ *limits of A. &c. in the county or counties of* or in
 “ *the borders or confines of the same, by means of setting up,*
 “ *erecting, and making of streams, mills, bridges, ponds, fish-*
 “ *garths, milldams, locks, hebbing-wears, hecks, floodgates, or*
 “ *other like lets, impediments, or annoyances, be letted, or inter-*
 “ *rupted, so that great and inestimable damage* for default of re-
 “ *paration of the said walls, ditches, banks, fences, sewers, gotes,*
 “ *gutters, calcies, bridges, and streams; and also by means of*
 “ *setting up, erecting, making, and enlarging of the said fish-garths,*
 “ *&c. and other like annoyances in times past has happened, and*
 “ *yet is to be feared, that far greater hurt, loss, and damages is*
 “ *like to ensue, unless that speedy remedy be provided in that*
 “ *behalf.*

“ S. 3. *We therefore, for that by reason of our dignity and*
 “ *prerogative royal we be bound to provide for the safety and*
 “ *preservation of our realm of England, willing that speedy*
 “ *remedy be had in the premisses, have assigned you, and * 6 of*
 “ *you, of which we will that A. B. and C. shall be 3, to be our*
 “ *justices, to survey the said walls, streams, ditches, banks, gutters,*
 “ *sewers, gotes, calcies, bridges, trenches, mills, mill-dams, flood-*
 “ *gates, ponds, locks, hebbing-wears, and other impediments, lets,*
 “ *and annoyances aforesaid, and the same to cause to be made, cor-*
 “ *rected, repaired, amended, put down, or reformed, as the case*
 “ *shall require, † after your wisdoms and discretions. And therein*
 “ *as well to ordain and do, after the form, tenor, and effect of all*
 “ *and singular the statutes and ordinances made before March 1,*
 “ *in the 23d year of our reign, touching the premisses, or any of*
 “ *them, as also to enquire by the oaths of the honest and lawful men*
 “ *of the said shire or shires, place or places, where such defaults*
 “ *or annoyances be, as well within the liberties as without (by*
 “ *whom the truth may the rather be known) through whose de-*
 “ *fault the said hurts and damages have happened, and who has or*
 “ *holds any lands or tenements, or common of pasture, or profit of*
 “ *fishing, or has or may have any hurt, loss, or disadvantage, by*
 “ *any manner of means in the said places, as well near to the*
 “ *said dangers, lets, and impediments, as inhabiting or dwelling*
 “ *thereabouts, by the said walls, ditches, banks, gutters, gotes,*
 “ *sewers, trenches, and other the said impediments and an-*
 “ *noyances; and all those persons, and every of them, to tax,*
 “ *assess, charge, distrain, and punish, as well within the metes,*
 “ *limits, and bounds of old time accustomed, or otherwise, or*
 “ *elsewhere, within our realm of England, * after the quantity of*
 “ *their lands, tenements, and rents, by the number of acres and*
 “ *perches, after the rate of every person's portion, tenure, or*
 “ *profit, or after the quantity of their common of pasture, or*
 “ *profit of fishing, or other commodities there, by such ways and*
 “ *mean, and in such manner and form, as you, or 6 of you, whereof*
 “ *A. B. and C. to be 3, shall seem most convenient to be ordained*
 “ *and done, for redress and reformation to be had in the pre-*
 “ *mises:*

* There
must be 6
commission-
ers, &c. at
the least
which shall
sit by force
of this com-
mission.

4 Inst. 275.

+ See Infra
**

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* See (B)
and (C)

“ *mills: and also to reform, repair, and amend the said walls,*
 “ *ditches, banks, gutters, sewers, gotes, calcies, bridges, streams,*
 “ *and other the premisses, in all places needful; and the same as*
 “ *often, and where need shall be, to make new, and to cleanse,*
 “ *and purge the trenches, sewers, and ditches, in all places ne-*
 “ *cessary; and further, to † reform, amend, prostrate, and over-*
 “ *throw all such mills, streams, ponds, locks, fish-garths, hebbing-*
 “ *wears, and other impediments and annoyances aforesaid, as shall*
 “ *be found by inquisition, or by your surveying and ‖ discre-*
 “ *tions, to be excessive, or hurtful;*

† A causey
or millbank
of stone
erected on
the river
Dec and
city of

Cheller before the time of E. 1. for the necessary maintenance of certain mills of the king's and of subjects, at the end of the causey were lately decreed by commissioners of sewers to have a breach of 10 roods long to be made in the causey, though it remained then as at first it was built, without any alteration. This matter being referred by the privy-council to the 2 Chief Justices and Chief Baron, who upon hearing counsel, resolved, that the *statute of Magna Charta. cap. 23. for putting down all kidels*, extends only to wears for taking fish; and that the first statute which extends to prostrating, &c. mills, &c. was 25 E. 3. cap. 4. which appoints such only to be prostrated as were erected in E. 1st's time, or after; but 1 E. 4. cap. 12. enacts, that mills, millbanks, and other impediments, before E. 1. or after which were inhabited should be corrected, &c. but that none of those acts extend to the case in question, and that 12 E. 4. cap. 7. confirms all those acts, and thereby the generality of Magna Charta. cap. 23, is restrained, as appears by the said acts, and 23 H. 8. cap. 5. which appoints the form, &c. of commissioners of sewers, and gives authority to them to survey walls, &c. and to correct, &c. them according to their discretions, does not repeal any of the said acts; besides, there is a proviso that all statutes, &c. not contrary to this act, nor heretofore repealed shall stand, &c. And they certified the privy-council that the 25th of E. 3. & 1 H. 4. are still in force, and that the authority of the commissioners extends not to mills, &c. erected before E. 1. unless they were raised higher, and thereby more prejudicial; and if they were, yet in such case they are only to be reformed, but not prostrated. 10 Rep. 137. b. Palch. 7 Jac. The case of Cheller Mills. 13 Rep. 35. S. C. Callis Lect. 4. cites S. C.

‖ See *Infra*. **

“ *And also to depute, and assign diligent, faithful, and true †*
 “ *keepers, bailiffs, surveyors, collectors, ‡ expeditors, and other*
 “ *ministers and officers, for the safety, conservation, reparation,*
 “ *reformation, and making of the premisses, and every of them;*

† A clergy-
man having
lands with-
in the le-
vel [of
Romney-

Marsh in Kent] was made an expeditor by the commissioners of sewers, whereupon he prayed his writ of privilege and it was granted; for the register is, *vir militans deo non implicetur negotiis secularibus*; and the ancient law is, *quod clerici non ponantur in officia*. Vent. 105. Mich. 22 Car. 2. B. R. Dr. Lee's case. Mod. 282. pl. 28. Trin. 29 Car. 2. B. R. S. C. and it was insisted that he was Archdeacon of Rochester, where his constant attendance was required. It was answered that his predecessor did execute this office, and the Court ordered notice to be given, and cause shewn why the doctor should not do the like. But afterwards Rainsford and Moreton only being in Court it was ruled, that he should be privileged, because he is a clergyman. But the Reporter says he thinks for another reason, viz. because the land is in lease, and the tenant, if any, ought to do the office. Lev. 303. Mich. 22 Car. 2. B. R. S. C. by name of the Archdeacon of Rochester's case, says, that the writ of privilege was prayed for both reasons. 1st, Because he was an ecclesiastical person. 2dly, Because all the land which he had in the level was in lease for 99 years; and that the writ was granted by Rainsford and Moreton; by Moreton for the 1st reason and by Rainsford for the 2d.

“ *And to bear the account of the collectors and other ministers*
 “ *of and for the receipt and laying out of the money that shall be*
 “ *levied and paid, in and about the making, repairing, reforming,*
 “ *and amending of the said walls, ditches, banks, gutters, gotes,*
 “ *sewers, calcies, bridges, streams, trenches, mills, ponds, locks,*
 “ *fish-garths, flood-gates, and other impediments and annoyances*
 “ *aforesaid; and to distrain for the arrearages of every such col-*
 “ *lection, tax, and assess, as often as shall be expedient, or other-*
 “ *wise, to punish the debtors and detainers of the same, by fines,*

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H h 4

“ *americiaments,*

**** Notwithstanding the words of the commission give authority to the commissioners to act according to their discretion, yet their proceedings ought to be bounded by the rule of law and reason. 5 Rep. 100. a. in Rooke's case. S. P. 10 Rep. 140. in Keighley's case.**

†† The commissioners of sewers throughout England are not bound to pursue the laws and customs of Rumney-Marsh. Resolved clearly, notwithstanding the words in the statute of 23 H. 8. cap. 5. But in case where any particular place within their commission has such laws and customs as Rumney-Marsh has, there they may pursue them. 10 Rep. 140. in Keighley's case. Callis Lett. g. cites S. C. and says, that in his

“ *And also to arrest and take as many carts, horses, oxen, beasts,*
 “ *and other instruments necessary, and as many workmen and la-*
 “ *bourers, as for the said works and reparation shall suffice,*
 “ *paying for the same competent wages, salary, and stipend, in that*
 “ *behalf, and also take such, and as many trees, woods, under-*
 “ *woods, and timber, and other necessities, as for the same works*
 “ *and reparations shall be sufficient, at a reasonable price, by you,*
 “ *or 6 of you, of the which we will that A. B. and C. shall be*
 “ *3, to be assessed or limited, as well within the limits and bounds*
 “ *aforsaid, as in any other place within the said county or counties,*
 “ *near unto the said places: and to make and ordain statutes, or-*
 “ *dinances, and provisions, from time to time, as the case shall*
 “ *require, for the safeguard, conservation, redress, correction, and*
 “ *reformation of the premisses, and of every of them, and the parts*
 “ *lying to the same necessary and beehooiful, after the laws and*
 “ *custom of †† Rumney-Marsh in the county of Kent, or otherwise,*
 “ *by any ways or means, after your own wisdoms and discretions;*
 “ *and to hear and determine all and singular the premisses, as well*
 “ *at our suit as at the suit of any other whatsoever, complaining*
 “ *before you, or any 6 of you, whereof A. B. and C. shall be*
 “ *3, after the laws and customs aforsaid, or otherwise, by any*
 “ *other ways and means after your discretions; and also to make*
 “ *and direct all writs, precepts, warrants, or other commandments,*
 “ *by virtue of these presents, to all sheriffs, bailiffs, and all other*
 “ *ministers, officers, and other persons, as well within the liberties*
 “ *as without, before you, or 6 of you, whereof the said A. B,*
 “ *and C. to be 3, at certain days, terms, and places to be pre-*
 “ *fixed, to be returned and received; and further to continue the*
 “ *process of the same, and finally to do all and every thing and*
 “ *things, as shall be requisite for the due execution of the premisses,*
 “ *by all ways and means, after your discretions; and therefore we*
 “ *command you, that at certain days and places, when, and where,*
 “ *ye, or 6 of you, whereof the said A. B. and C. to be 3, shall*
 “ *think expedient, ye do survey the said walls, fences, ditches,*
 “ *banks, gutters, gotes, sewers, calcies, ponds, bridges, rivers,*
 “ *streams, water-courses, mills, locks, trenches, fish-garths,*
 “ *flood-gates, and other lets, impediments, and annoyances afore-*
 “ *said, and accomplish, fulfil, hear, and determine, all and sin-*
 “ *gular the premisses, in due form, and to the effect aforsaid,*
 “ *after your good discretions; and all such as ye shall find negli-*
 “ *gent, gain-saying, or rebelling, in the said works, reparations,*
 “ *or reformations of the premisses, or negligent in the due exe-*
 “ *cution of this our commission; that ye do compel them by dis-*
 “ *treffs, fines, and amerciaments, or by other punishments, ways,*
 “ *or means, which to you, or 6 of you, whereof the said A. B.*
 “ *and*

“ and C. shall be 3, *shall seem most expedient* for the speedy re-
 “ medy, redress, and reformation of the premisses, and due exe-
 “ cution of the same; and all such things as by you shall be made
 “ and ordained in this behalf, as well within liberties as without,
 “ that you do cause the same firmly to be observed, doing therein
 “ as to our justice * appertains, after the laws and statutes of this
 “ our realm, and according to your † wisdoms and discretions.

opinion the
 commis-
 sioners may
 if they
 please make
 ordinances
 and laws
 like those
 of Romney-
 Marsh,

where there hath not been any such use, and he thinks the words of the statute will bear the con-
 struction; and that the said opinion of Sir Edward Coke is not directly against it; and that upon
 decrees for sales of land it is usual in those decrees to bind those lands to the perpetual repairs.

† See supra. **

“ S. 4. *Saved* always to us *such fines* and amerciaments as
 “ to us thereof shall belong; and we also command our sheriff or
 “ sheriffs of our said county or counties of that they
 “ shall cause to come before you, or 6 of you, of the which A. B.
 “ and C. shall be 3, at such days and places as ye shall appoint
 “ to them, such and as many *honest men* of his or their bailiwicks,
 “ as well within the liberties as without, by whom the truth may
 “ best be known, to enquire of the premisses, commanding also all
 “ other ministers and officers, as well within the liberties as with-
 “ out, that they and every of them shall be attendant to you in
 “ and about the due execution of this our commission. In wit-
 “ nefs whereof we have caused these our letters-patent to be made,
 “ witness ourself at Westminster, the day of
 “ in the year of our reign.”

S. 5. Every *such* commissioner, after he has knowledge thereof,
 shall put his diligence about the execution of the said commissions,
 and before he shall take upon him the execution of the said com-
 mission, he shall take an oath before the Lord Chancellor, or such
 to whom the Chancellor shall direct the writ of *dedimus potestatem*,
 or before the justices of peace in the quarter-sessions.

S. 6. Every statute heretofore made concerning the premisses, See supra,
 not being contrary to this act, nor heretofore repealed, shall stand S. 3. The
 for ever. case of
 Chester
 Mills.

S. 7. The commissioners named in the said commissions, have power
 to make laws and decrees, and to do every thing mentioned in the
 commission; and the same laws to reform and make new.

S. 8. If any person assessed for any lands within the limits of See (B)
 any commission, do not pay according to the ordinance of the com-
 missioners, by reason whereof the commissioners, for lack of pay-
 ment, shall decree the lands from the owners thereof, and their
 heirs, to any person for term of years, term of life, in fee-simple, or
 in tail, for payment of the same lot; every such decree ingrossed in
 parchment, shall bind all persons that at the making of the said
 decree had any interest in such lands, and not to be reformed,
 unless by authority of parliament.

S. 9. The same laws and decrees shall bind as well the lands of See (C) p. 5.
 the king as all other persons.

S. 10. If any person take upon him to sit by virtue of the said
 commissions, not being sworn in form aforesaid; or if any person
 sit

See (G) per
tot.
This sta-
tute was
made for
the ease of
the people,
to wit, that
the defend-
ants who
are prose-
cuted for
acting under
that statute,
may plead
it or not
plead it at
their elec-
tion. (Hill.
ss Car.
B. R.) But the safest way is to plead it. s L. P. R. Tit. Statute.
*[415]

fit as aforesaid, not having lands for term of life, to the yearly value of 40 marks, except he be resiant, and free of any city, borough, or town corporate, and have moveable substance of the value of 100l. or else be learned in the laws, viz. admitted in one of the 4 inns of Court for an utter barrister, he shall forfeit 40l. for every time, the one half to the king, and the other half to the use of him that will sue therefore.

S. 11. *If any action shall be attempted for taking any distress, or any other act doing, by authority of the commission, the defendant may make avowry, confession, or justification, alleging that the said distress, or other act whereof the plaintiff complains, was done by the authority of the commission of sewers, for lot or tax assessed by the said commission, or for such other act or cause as the said defendant did, by authority of the same commission, and according to the tenor, purport and effect of this act, without expressing any other circumstance; whereupon the plaintiff shall be admitted to reply, that the defendant did take the said distress, or did any other act supposed in his declaration of his own * wrong, without any such cause alleged by the defendant; whereupon the issue shall be joined to be tried by verdict.*

S. 12. *After such issue tried for the defendant, or nonsuit of the plaintiff after appearance, the defendant shall recover treble damages, by reason of his wrongful vexation, with his costs, and that to be assessed by the same jury, or writ to inquire, as the case shall require.*

S. 13. *Gives allowance to commissioners, their clerks and assistants.*

S. 14. *When such commission shall be made for the amendment of the premisses within the dutchy of Lancaster, such commissioners shall be appointed by the Lord Chancellor and Lord Treasurer, and the 2 Chief Justices, and the Chancellor of the dutchy, or 3 of them, whercof the Lord Chancellor and the Chancellor of the dutchy to be 2. And 2 commissions shall be awarded, one under the great seal, and the other under the seal of the dutchy.*

S. 15. *The said commissions shall be had without charge, unless to the king 2s. 6d. for the seal; and for the writing and inrolling of any commission 5s.*

S. 16. *After any commission made, the king shall at his pleasure, by superedeas out of Chancery, discharge as well every such commission, as every commissioner named by authority of this act.*

S. 18. *When such commission shall be made for amendment of the premisses within the principality of Wales, the county palatine of Chester, or within any other place where there is jurisdiction of county palatine, 2 commissions shall be made, one under the great seal, the other under the seal of the county palatine.*

S. 20. *Provided that the Chancellors, and such other as shall have the custody of the seals of the principality of Wales, or the county palatine*

palatine of Chester, or of any other place where there is liberty of county palatine, upon reasonable requests, and upon sight of the commission under the great seal, shall make out another commission under the seal of the county palatine, according to the tenor of the king's commission under the great seal. This act to endure 20 years.

Made perpetual by 3 & 4 E. 6. cap. 8.

5. 25 Hen. 8. cap. 10. S. 1. Enacts, that no person shall be compelled to be sworn, or to sit in execution of any commission of sewers, unless he be dwelling within the county whereof he shall be assigned commissioner.

S. 2. If any person assigned commissioner of sewers be required by such as have authority to receive the oath, every person that refuses to take the same oath, and that refusal returned into the Chancery, shall forfeit for the contempt 5 marks; and so from time to time, unless he in the Chancery shew in the term wherein such return shall be made against him, sufficient cause to be allowed by the Lord Chancellor for his excuse.

6. 3 & 4 Edw. 6. cap. 8. S. 2. Enacts, that all scots, lots, and sums of money, to be rated by virtue of such commission of sewers, upon any the lands of the king, shall be levied by distress or otherwise in like manner as in the lands of any other person. And all bills of acquittance of such receiver as shall have the collection thereof, shall be a sufficient discharge to the tenants, as also a sufficient warrant to all receivers, auditors, and other officers of the king, for the allowance to such tenant for the same. Moreover such fees, and none other, shall be paid for any commission or dedimus potestatem under the seal of the duchy, as mentioned in the former act, to be paid in the Chancery.

7. 1 M. Sess. 3. cap. 11. Enacts, that the statute of 23 H. 8. 5. and all commissions of sewers shall extend and give authority, that the commissioners therein named for the county of Glamorgan, or 6 of them, (whereof 3 to be of the quorum) shall, by this act and the said statute of H. 8. and commission, have power to make laws, ordinances, and decrees, within the said county, for the redress and saving of grounds there from hurt and * destruction by reason of sand rising out of the sea, and driven to land by storms and winds, as they may do by the said former act and commission, for avoiding the outrageous course and rage of the sea and other waters.

The act of 23 H. 8. does not extend to, nor give authority to the commissioners of sewers to reform the great hurt and nuisance by reason of the sand

rising out of the sea, and driven to land by storms and winds. And therefore this special provision is made for the county of Glamorgan. 4 Inst. 275, 276.

8. 13 Eliz. 9. S. 1. Enacts, that all commissions of sewers shall continue in force for 10 years after the date thereof, unless they be repealed by a new commission or supersedeas. And that all laws, ordinances, and constitutions, duly made according to the statute of 23 H. 8. 5. and written in parchment indented, under the seals of the commissioners, or 6 of them, (whereof one part shall remain with the clerk of the commission, and the other in such place as the commissioners, or 6 of them, shall appoint) shall, without any certificate to be made into the Chancery, and without the king's assent, continue in force notwithstanding any determination of such commission by supersedeas,

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The commission of sewers expires by the death of the king, and does not [in such case] continue 10 years from the granting it, notwithstanding these words

until

of the statute. Re-
solved per Cur. And it was said to have been so resolved by all the justices at Serjeant's-Inn. Lat. 170,
171. Trin. 2 Car. Thirley v. Warn and Sands.

S. 2, 3. After the end of 10 years next after the teste of a commission all laws, ordinances, and constitutions made by virtue thereof, and written in parchment, &c. shall continue in force one whole year after the said 10 years, during which time the justices of peace of the county or counties whither it is directed, or 6 of them, (2 quorum) have power to execute such commission and law, &c. as fully as commissioners themselves, unless in the interim a new commission be sent forth.

S. 4. No farmer for years of any lands, &c. lying within the limits of the commission, (which shall be chargeable with any laws, &c. made by virtue of any such commission, wherein he shall be a commissioner) not having any estate of freehold in England worth 40l. per annum, shall have any power to sit or intermeddle with any such commission during the time he shall be farmer and not have freehold as aforesaid; but every such commission, as to him only, shall be adjudged void. See S. 7.

The execu-
tors of a
person as-
sessed
brought a

S. 5. Commissioners shall not be compelled to make any certificate or return of the commission, or any of their laws, ordinances, or doings, by virtue thereof.

certiorari and removed the proceedings before the commissioners into B. R. And there Mallet J. conceived, that the proceedings are not lawfully removed into this Court, because no certiorari lies to remove their proceedings at this day, they being now in English, upon which he cannot judge; for all our proceedings ought to be in Latin: besides, he said, he cannot judge upon any case if it be not before us by special verdict, demurrer, or writ of error; and we are not enabled to judge as this case is, for the conclusion of the writ is, quod faciamus quod de jure & secundum legem, &c. fuerit faciend. And though they have power to proceed in English by the statute of 23 H. 8. cap. 5. it does not reserve any power to us to redress their proceedings. And he thought no writ of error lies at this day to correct their proceedings, because they are in English; and if they have jurisdiction, and proceed according to it, we cannot correct them; for the statute leaves them at large to proceed according to their discretions. But where they have no jurisdiction, there we may correct them. True it is, that before the statute of 23 H. 8. there are many precedents of certioraries to remove their proceeding into this Court, for then their proceedings were in Latin; but said, he does not find any since the statute. And so concluded, that no certiorari will lie in this case; and then the proceedings not being lawfully removed, he said, he cannot judge upon them; and therefore would speak nothing to the matter in law therein contained. Heath J. contra, that this Court is well possessed of the cause, and may well determine it. The question here was not, whether the cause be well removed? but whether the commissioners have well proceeded, as this case is, or not? And held the cause well removed, there being no Court whatsoever but is to be corrected by this Court. He agreed, that after the statute no writ of error lies upon their proceedings; but that proves not that a certiorari lies not; they are enabled by the statute to proceed according to their discretions, and therefore if they proceed secundum æquum & bonum, we cannot correct them: but if they proceed where they have no jurisdiction, or without commission, or contrary to their commission, or not by jury, then they are to be corrected here. If a Court of Equity proceed where they ought not, we grant a prohibition. Without question, in trespass or [417] replevin their proceedings are examinable here; and he saw no reason but upon the same ground in a certiorari they cannot make a decree of things merely collateral, or concerning other persons. Brampton Ch. J. held the proceedings lawfully removed, and that the certiorari lies; but he confessed if he had thought of it, he would not have granted it so easily; but it was not made any scruple at the bar, nor any thing said to it; and hereafter he should be very tender in granting them. True it is, before the statute of 23 H. 8. they were common, but there are few to be found after the statute; and we ought to judge here as they ought to judge there, and we cannot determine any thing upon English proceedings; and said, at first he put that doubt to the clerks of the Court, whether if we confirm their decree, we ought to remand it, or whether we ought to execute it by writ into the Exchequer, or not? And they could not resolve him; wherefore he much doubted whether they might proceed to question their decree upon this certiorari,

rari, or not. But because he was informed, that the parties by agreement had made this case as it is here before us upon the certiorari, and had bound themselves voluntarily in a recognizance to stand to the judgment of the Court upon the proceedings, as they were removed upon the certiorari by the agreement of the parties; therefore he did not stick upon the certiorari, because what was done was *by consent*, & consensus tollit errorem, if any be. March 196, &c. pl. 241. Pasch. 18 Car. Cummins v. Massam. See (E) pl. 2.

S. 6. *The clerks of the commission shall yearly estreat all issues, fines, penalties, forfeitures, and amerciaments, due and answerable to the queen, her heirs and successors, and shall yearly deliver them into the Exchequer, (as justices of peace ought to do by virtue of their commission) in pain of 5l.*

S. 7. *Provided, that the abovesaid farmer may act in the commission as concerning all other lands, save only the lands whereof he is so farmer, as aforesaid.*

9. 3 Jac. 1. 14. Enacts, that all walls, ditches, banks, gutters, sewers, gates, causeways, bridges, streams, and water-courses, within 2 miles of London, having their fall into the Thames, shall be subject to the commission of sewers, and to all statutes made for sewers, and to all penalties in the said statutes contained.

10. 7 Ann. cap. 10. Enacts, that commissioners of sewers may, after the 25th of March 1709, or any 6 of them, for non-payment of any let or charge assessed on copyhold lands, decree the same from the owners and their heirs to any person, and for such estate as they had at the time of the decree so made; such decree to be executed as decrees are concerning freehold.

Proviso, that the buyer, before he shall enter or take any profits, must agree with the lord of the manor for the fine usually paid, and at the next Court the lord shall grant the copyhold to the vendee, and admit him tenant.

The commissioners of sewers, or 6 of them, may, by warrant under their hands and seals, empower any person to levy the money by them assessed on the lands, meadows, marshes, or grounds, chargeable with any cesses, by virtue of their commission, by distress and sale of their goods, &c.

(B) Assessments. How, and the Manner of Levying.

I. **T**HE taxation, assessment, and charge, ought to have these qualities: 1st, It ought to be according to the quantity of their lands, tenements, and rents, and by the * number of acres and perches. 2dly, According to the rate of every person's portion, tenure or profit, or of the quantity of the common of pasture, or of fishing or other commodity. And therefore it was clearly resolved by all, (viz. Cook Ch. J. and Daniel and Foster J.) that the taxation generally of a several † sum in gross upon a vill is not warranted by their commission, but ought to have been particular according to the express words upon every owner ‡ or possessor of lands, tenements, rents, &c. observing the said qualities

[418]†
See (A) and
(G)
Callis Lett.
2. fol. 122.
&c. insists
very strenu-
ously, that
a tax on a
township is
good.—
* It was in-
sisted, that
the tax can-
not be laid
generally
upon the
vill, but

distribu- lities aforeaid. 10 Rep. 143. Mich. 7 Jac. in the case of the
tively; for Isle of Ely.
every one

of the inhabitants has not an equal share of the land, nor are all the lands of an equal goodness. And there is no custom for the vill taxed to apportion the tax; so that the commissioners have no authority to do it. And Roll Ch. J. said, the tax ought to be equally laid according to the statute, viz. Upon the number of acres. Sty. 185. Mich. 1649. in the case of Custodes, &c. v. Owtwell, &c. Inhabitants.

† a Bulst. 198, 199. Hill. 11 Jac. Doderidge J. held, that the assessment could not be laid upon the whole vill. Hetley v. Boyer & al. — Cro. J. 336. pl. 5. S. C. and there held accordingly, that the tax ought to be laid severally and proportionably to every inhabitant by himself, as was adjudged in Rooke's case. 5 Rep. 100. a.

Mo. 825. pl. 1113. at the Court at Whitehall, 8 Nov. 1616. upon complaints laid before them relating to commissions of sewers, their lordships declared, that they finding in their wisdoms that it can neither stand with law, or common sense and reason, that in a cause of so great consequence the law can be so void of providence as to restrain the commissioners of sewers from making new works to stop the fury of the waters, as well as to repair the old when necessity does require it for the safety of the country, or to raise a charge upon the towns or hundreds in general that are interested in the benefit or loss, without attending a particular survey or admeasurement of acres when the service is to have speedy and sudden execution, or that a commission of so high a nature, and of so great use to the commonwealth, and evident necessity, and of so ancient jurisdiction both before the statute and since, should want means of coercion for obedience to their orders, warrants, and decrees, when as upon the performance of them the preservation of thousands of his majesty's subjects, their lands, goods, and lives does depend; and plainly perceiving that it will be a direct frustration and overthrow to the authority of the said commission, if the commissioners, their officers and ministers, shall be subject to every suit at the pleasure of the delinquent in his majesty's Courts of common law, and so to weary and discourage all men from doing their duties in that behalf; for the reasons aforeaid, and for the supreme reason above all reasons, which is the salvation of the king's lands and people, their lordships have ordered, that the persons formerly committed by this board for their contempts concerning this cause, shall stand committed until they release or sufficiently discharge such actions, suits, and demands, as they have brought at the common law against the commissioners of sewers, or any the officers or ministers of the said commission; saving unto them, nevertheless, any complaint or suit for any oppression or grievance before the Court of sewers, or before this table, if they receive not justice at the commissioners hands. And their lordships further order, that letters from this table shall be written unto the commissioners of the counties therein named, and unto all other commissioners of sewers of like nature, when it shall be found needful, requiring, encouraging, and warranting them to proceed in the execution of their several commissions, according to former practice and usage, any late disturbance, opposition, or conceit of law, whereupon the said disturbance has been grounded notwithstanding; with admonition nevertheless that care be taken that there be no just cause of complaint given by any abuse of the said commission. — [And in the very next pl. viz. Mo. 826. pl. 1114. may be seen the downfall of that great man, late Ld. Ch. but then only Sir Edward Coke, partly by reason of the judgments given relating to the commissioners of sewers, &c. as will there appear.]

2. On certiorari the defendant *justified* distress for an acre-tax: and whether this was good or not, was the question. The Court conceived this not a fit way, it being to put the commissioners to enquire of the value of every acre; but on return of the orders by certiorari *this Court cannot determine it, but the commissioners must*; and in trespass or trover it may be proper; and ex motione Jeoffryies a *procedendo* was granted. 3 Keb. 827. pl. 54. Mich. 29 Car. 2. B. R. Commissioners of Sewers v. Newburg.

Ibid. at the end there is a note added, that the sale of land in the fens on the act for draining, is made 4 months after default of payment

3. 300 acres of land in the fens, were demised at 60l. a year rent to J. S. who covenanted to pay all taxes. A tax of 30l. was imposed on these lands, and a penalty of 3l. incurred. The officers appointed to sell, sell 100 acres, part of the 300, for 33l. to one of the commissioners. The lessor brought a bill in Chancery for relief, setting forth the demise as above, and that the lessee having in his hands rent sufficient to pay the 33l. combined with the purchaser (whom he made defendant) and so to defeat him of the

the inheritance, forbore to pay the money; and that *the 100 acres were worth 400l.* The defendant denied combination, and pleaded to the rest the statute of draining, and that the sale was made according to, and by virtue of those statutes. Lord Chancellor allowed the plea; for he *could not relieve contrary to an act of parliament*, and if he should, it would destroy the whole economy of the preservation of the fens; and compared it to the case of a mortgagor of houses * in London of great value, that should be settled by the judges according to those acts made concerning London to be rebuilt: this Court shall not examine any sale on pretence of equity. 2 Chan. Cases, 249. Hill. 30 & 31 Car. 2. Brown v. Hamond.

twice in the year, and their use is to expose first 10 or fewer, or more acres for the sum in arrears, and so increase till a chapman offers, &c. and never sell for more than what is in arrears

of the tax and penalty, and it seems *can sell for no more.* 2 Chan. Cases, 250.

4. A general assessment on all the lands from such a place to such a place, is wrong; and a distress being made by B. by warrants from the commissioners, his acting under the warrant, is no plea in action brought against him, nor will the Court of Chancery interpose upon suggesting this matter to supersede such actions. And Lord Chancellor would not relieve, and said that if it should aid in such case, then the orders of commissioners of sewers would be made in this Court; and that the money levied by such a wrongful assessment ought to be refunded, and a new assessment made. 9 Mod. 94, 95. Pasch. 10 Geo. Bow v. Smith.

5. And the assessment being to raise money to make a new sluice, the defendant insisted that the assessment *ought to be upon every particular tenant proportionable to the damage he might sustain*, and that the commissioners had no power to tax him; for that there was an old sluice near the place where the new one was intended to be built, which was sufficient to secure all the level; and that the new one would be of no manner of advantage to him, and therefore he ought not to contribute to the building it. And Lord Chancellor said, the right way of making it is to assess the particular lands according to the danger they are in, and that it is *not necessary to name the owners or occupiers of such lands*; for the commissioners may not know them: and if the not naming the owners should make the assessment void, there would be an end of all assessments by commissioners of sewers. 9 Mod. 94, 95. Bow v. Smith.

(C) Chargeable towards Repairs, &c. Who. See (A) (D) and (G)

1. **I**N *replevin*, the defendant justified by authority of a commission of sewers directed to W. R. and to survey all walls, &c. in the Thames in Kent, &c. and that one C. was assessed so much, for non-payment whereof the defendant took the distress; that the *jury impannelled* by the commissioners *presented that C. held 7 acres* next adjoining to the river, and in which the distress was taken for a tax of 8s. per acre assessed upon the said C. And that

that the jury found that the occupiers of the said 7 acres always used to repair the said bank, sometimes by presentment and sometimes without; and that other persons had land amounting to 8000 acres within the same level, subject to be surrounded if the said bank be not repaired. Resolved, 1st, That finding the repairing by the occupiers was not material, because such might have been tenants at will, or other particular tenants as could not by their act bind the inheritance. The commissioners ought to tax all, that are in danger of being damaged by not repairing, equally, and that by the precise words in the form of the commission specified in 6 H. 6. cap. 5. which requires all who may suffer loss, or receive advantage, to contribute equally. 5 Rep. 99. b. 100. Hill. 40 Eliz. C. B. Rooke's case.

[420]
Walmsley J.
explained
his opinion
in this case
of Rooke,
that the
commis-
sioners
ought not
to charge
him who is
bound by

2. If the owner of the land was bound by prescription to repair the bank of the river, yet upon a commission of sewers awarded, the commissioners ought not to charge him alone with the whole, but must tax all that have land in danger; and the statutes were made for this purpose; for otherwise it might happen that all the country be surrounded before one single person can repair the bank; and this appears by the letter of the statutes. Per Walmsley J. Nor was it denied by any; and judgment was accordingly given for the plaintiff. 5 Rep. 100. a. in Rooke's case.

prescription only, which he says, he intended *where no default is in him; but where there is default in him* (which agrees with the words of the stat. of 23 H. 8.) and *no inevitable necessity for insufficiency or otherwise*, but that he himself may do it, there he himself only shall be charged by force of the said commission, and he said, that his reason given in Rooke's case implied as much, viz. For otherwise it might be, that all the country shall be surrounded, which reason imports his intention, that all that had lands in danger should not be charged, but in case of insufficiency of him who is bound, or for other inevitable necessity. 10 Rep. 140. a. b. in Keighley's case.—— Callis Lect. 2. takes notice of this, and asks how it could be presumed, that the learned makers of this worthy law, would have stricken down at one blow so many thousand prescriptions, customs, tenures, covenants and uses, as be within this realm, which be tied and bound to do and make the repairs in this kind, some in consideration of houses and land, others for yearly rents, and for other causes, which to have set at liberty, and to have imposed the charge on the levellers, would have wrought and brought a wonderful innovation, change, and alteration in these works; all which by this exposition are freed and saved.—— If one be bound by prescription to repair a wall, yet to prevent a present and publick danger, the commissioners may tax others to do it. Per Roll Ch. J. Mich. 1649. in the case of Outwell, &c. Inhabitants.

3. None can be taxed towards the reparation, &c. but *those that have damage, &c. by the default, or benefit by the reformation.* 10 Rep. 142. b. 143. a. Resolved in the case of the Isle of Ely.

4. If one is bound by *prescription to repair a wall contra Fluxum Maris*, and he keeps it well repaired, but a *sudden unusual flood breaks it down or overflows it*, the commissioners ought to tax all that have lands, &c. and who may be any ways damaged, and this by reason of the inevitableness; but otherwise he only may be charged who by prescription is bound to do it, in case any default be in him, and the danger is not inevitable. 10 Rep. 139. a. b. Mich. 12 Jac. C. B. Keighley's case.

5. In an *action for taking and selling a distress*, by warrant from commissioners of sewers, it was (among other things) insisted, that it appears there are 800 acres of land which are in the hands of the king, which are not taxed as by law they ought, and

so the tax is unjust, because by the not taxing of them a greater burden was laid upon the rest of the land than of right ought to be; and this the Court held a good exception, and said that the king's lands are taxable by the statute. Sty. 13. Pasch. 23 Car. B. R. in case of Whitley v. Fawcett.

6. In *trespass* the defendant justified by commissioners of sewers, the plaintiff replied *de injuria sua propria*; and in evidence to a jury at bar, the sluice appeared to be in the level in Wapping, and that the plaintiff was inhabitant of Ratcliff higher grounds than ran through these into the Thames. And per Curiam, all grounds that do annoy the sluice are chargeable, or that have advantage by maintenance of it, albeit not within the level; but this level being at first overflowed, and drained by a private act of parliament in the time of H. 8. and so the plaintiff had *neither benefit nor prejudice*; therefore the distress ill taken, which was agreed per Curiam in direction to the jury; and verdict for the plaintiff. 2 Keb. 675. pl. 53. Trin. 22 Car. 2. B. R. Anselm v. Barnard.

The case here is according to the very words of the Report.

(D) Power of the Commissioners.

[421]
Sec (A) i.

1. **T**HE commissioners decreed a new river to be cut out of the river O. through the main land for 7 miles in the Isle of Ely, unto another part of the old river; and for that purpose taxed 5 vills, that were fen, severally, and 9 other vills out of the isle in the county of Cambridge, and laid the tax generally, viz. * So much upon one town and so much upon another. Resolved, 1st, That the commissioners cannot make a new river out of the main land, for 4 reasons. 1st, The 23 H. 8. prescribes the form, &c. of the commission in express words, which extend only to reparation and new making of ancient walls. 2dly, The words (*et alia*) which were included in the statute of 6 H. 6. and the subsequent acts are omitted out of this commission. 3dly, All the former acts were temporary, but this of 23 H. 8. which establishes this commission, is made perpetual by 3 E. 6. cap. 8. And therefore it would be hard to enlarge it beyond the words, and empower commissioners to try new inventions at the country's charge. 4thly, It appears by the writ of ad quod damnum in the Register 252, and F. N. B. 225. (E) that a new trench or river cannot be made, and the old one stopped, without an ad quod damnum and licence of the king; but if an old sewer be to be cleansed, some little alteration, in respect of the natural change of the current, &c. may be made for the public good. So if an old wall be broke down by the rage of the water, another may be made within the same level; for this is no new invention: but when by timely reparation of the old wall the extreme peril may be avoided, no other ought to be made; and if new inventions proposed (as artificial mills to cast out water, &c.) are

S. P. 2 Bull. 198. Hetley v. Boyer.

* See (B) pl. 1. S. C. and P. resolved to be ill; and see there the consequences and effects of that and the like resolutions.

apparently profitable, no owner will deny contribution by consent. 10 Rep. 141. Mich. 7 Jac. The case of the Isle of Ely.

2. If lands or chattels are given for reparation of a sea-wall, that is within the jurisdiction of the commissioners, and they may meddle with it. Mar. 200. Pasch. 18 Car. cited by Brampton Ch. J. to have been adjudged.

3. *Lessee for years* of lands within a level, subject to be drowned by the sea, *covenanted to pay all assessments, charges, and taxes, towards or concerning the reparation of the premises*: a wall which was in defence of this level, and *built straight, was thrown down by a sudden and inevitable tempest*; one, within the level subject to be drowned, *disbursed all the money* for building a new wall by order of the commissioners of sewers, a *new wall was built in the form of a horseshoe*; and the commissioners taxed every man within the level towards repaying the sum disbursed, and among others *the lessee for years*, whom they also *trusted with the collecting all the money, and charge him* totally for the land (not levying any thing upon him in reversion) and also *with damages, viz. Interest for the money*. Lessee for years dies, the lease being within a short time of expiration; his executor enters into the land, and the commissioners charge him with the whole, and the years immediately after expire: the executors brought a certiorari. Brampton Ch. J. said that here are 5 points. 1st, Whether the covenant shall extend to this new wall. And Brampton and Heath J. held, that *the covenant extends well to this new wall*, and that the *making it in a new form, viz. Of a horse-shoe*, is not material, so as it be adjoining to the land, as here it was; for that may be ordered according to their discretions. And Brampton said, that it is a rule in law, that every man's covenant shall be construed strongest against himself; and though in this case the new wall be not parcel of the premises, [422] as it was at the time of the covenant, because that was a straight wall, yet according to the words of the covenant, this tax is towards the reparation of the premises; and should it not extend to this new wall, the covenant would be vain and idle: and clearly, the meaning of the parties was, that it should extend to all new walls. Mar. 196. 199. pl. 241. Pasch. 18 Car. Commins v. Massam.

4. Another point was, whether *this collateral covenant be within their jurisdiction*. And as to this, Brampton and Heath held that it was: and Heath conceived the lessee bound by it, because it is presumed that the lessee has considerable benefit by it, and that the commissioners might take notice of it. And he said, that though the covenant should not bind the lessee, yet for his part he would not reverse the decree for that, because where they have jurisdiction they may proceed according to their discretions; and he covenanted to *pay all taxes concerning the premises*, and here this concerns the premises, notwithstanding the wall be in a new form. And Brampton said, that true it is, as it is said 28 H. 8. that contracts are as private laws between party and party; but he observed that *by their commission they may charge every*

every man according to his tenure, portion, and profit; and though he that is bound by custom or prescription to repair such walls, is not within the words of their commission, yet it is resolved in the 10 Rep. 139, 140. in Keighley's case, that the commissioners may take notice of it, and charge only him for the reparations where there is default in him, and the danger not inevitable; and by the same reason that you may exclude this covenant from being within their jurisdiction, you may exclude prescription also. He agreed that a *covenant merely collateral*, as a covenant *by a stranger, to pay charges for repairing such a wall*, is not within their jurisdiction, because he is a mere stranger, and cannot be within their commission; but here the covenantor is occupier of the land. Mar. 198. 200. pl. 241. Pasch. 18 Car. Commins v. Massam.

5. A 3d point was, whether their power extends to an executor, or not? Heath said, that the testator was chargeable, and here the *executor occupied*, though it was only for a short time, and he was an occupier at the time of the decree; and therefore it is reason that he should be charged. And Brampton held the executor is chargeable; and though now the *executor* was said not to have assets, yet they both held that he *not having alleged* that before the commissioners, has lost that advantage, and cannot do it now; and it *shall be intended that he had assets, by his not gainsaying it before*. Mar. 198. 200. Commins v. Massam.

6. A 4th point was, whether the commissioners had *jurisdiction of damages*, or not, viz. *To charge the lessee with the interest of the money*. And Heath held clearly that they had, because they had jurisdiction of the principal. And Brampton said that he at first chiefly doubted of this point, but he now holds that it is within their jurisdiction; and put the case that one in extreme necessity, as in this case, disburse all the money for the reparations of the wall, or sea-bank, if the case had gone no farther, clearly he shall be repaid by the tax and levy after; and conceived by the same reason they have power to allow him damages and use for his money; for if it should not be so, it would be very inconvenient; for who would after disburse all the money to help that imminent danger and necessity, if he should not be allowed use for his money? And the lessee here is only charged with the damages for the money collected, which he had in his hands, and converted to his own use; and therefore it is reasonable that he should be charged with all the damages: besides, they *having consue of the principal, have consue of the accessory*, as in this case of the damages. Mar. 199. 201. Commins v. Massam.

7. The Court was moved to quash an order made by the commissioners of sewers, charging the inhabitants of Westham in Essex, for *erecting of a tumbling bay (to prevent an inconvenience occasioned by Condon Lock, which in the very order is said to have been erected for a private benefit) and of a lock to prevent the damage which the tumbling bay would occasion to the navigation*. The Court was of opinion, that the order could not be maintained; because it was out of the power of commissioners of
[423]

sewers to charge inhabitants for finding an expedient, how a thing erected for a private benefit may be continued, and yet be no nuisance; their business should have been to have abated the nuisance. 10 Mod. 159. Pasch. 12 Ann. B. R. The Inhabitants of Westham's case.

8. Commissioners of sewers have no power to make a river navigable, nor even to improve the navigation of a river, beyond what it was before. *Preserve it they may* in the state it was, by removing obstructions, and other natural ways; but they cannot even help the navigation by erecting locks, or any such artificial method. 10 Mod. 159. Pasch. 12 Ann. B. R. The Inhabitants of Westham's case.

See (B) pl. 1.
the note.

(E) Commissioners punished. How, and for what.

1. COMMISSIONERS of sewers upon the statute of 23 H. 8. assessed a fine upon the village of D. and appointed it to be levied by J. S. and W. S. upon the cattle of the plaintiff, and they to sell them for the fine, which was done: H. the plaintiff brought his action against them in this Court, and had judgment. The commissioners called him before them, and importuned him to release the action, which he refusing, they committed him to the gaol, and the warrant to the gaoler was, to take and keep the said H. without bail or mainprize, till he should hear further from them of some order taken for his delivery: the Court granted an attachment against the commissioners. Some of them appearing were fined: it was holden, that the warrant, by them made, was in direct opposition to the authority and judgment of this Court; and against one of the commissioners, who being warned, did not appear, an indictment of premunire was drawn upon the statute of 27 E. 3. cap. 1. for his illegal acting as a commissioner. But he procured the king's pardon, which at last was allowed of by the Court. Cro. J. 336. pl. 5. Hill. 11 Jac. B. R. Hetley and Sir John Boyer, Sir Anthony Mildmay & al'.

Vent. 66.
Smith's
case, S. C.
says the
commis-
sioners im-
prisoned
the persons
as well as
fined them,
for not exe-
cuting their
warrant
made upon
such second
order, and
for speaking
contemptu-

2. The commissioners of sewers made a tax for reparation of Wapping wall. The inquisition upon which the rule was made was removed by certiorari into B. R. They made a new rate, and fined the inhabitants for not collecting it. Whereupon another certiorari issued, and then a third, after which an attachment went against them, and being thereupon brought into Court, it was objected, that by the statute 13 Eliz. cap. 9. the commissioners of sewers were not bound to obey certioraries out of this Court, nor to remove their orders; so that here was no contempt. But per tot. Cur. the statute does not extend to returns of certioraries, but excuses them from certifying their orders into Chancery, as by the statute of H. 8. they were to do before to the intent to have the royal assent; whereupon they were fined 40l. each, and committed for

for the contempt. Lev. 288. Pasch. 22 Car. 2. B. R. The King v. Smith & al.' Commissioners of Sewers. *ous words of the commis-
sioners.*

They were fined 40 marks a-piece, for not obeying the first writ, and 20 marks a-piece for not obeying the second writ. And Twisden J. said, it was resolved in 23d Car. That this statute has no reference to this Court, and that this clause extends only to certificates and returns into Chancery: the statute speaks of superseas, &c. which issue out of the Court of Chancery only; for this Court does not, nor ever did, send out superseas's, but this Court sends out certioraries which are to bring the business before the king here, and the words of them are *quia coram nobis terminari volumus, & non alibi*. Kelyng Ch. J. said, it is provided by 23 H. 8. cap. 5. That the laws, acts, &c. to be made by the commissioners of sewers, should stand good and effectual, &c. no longer than the commission endured, except they were engrossed in parchment, and certified under their seals, into the king's Court of Chancery; and then the king's royal assent to be had to the same, &c. But that was altered by this of 13 Eliz. whereby it is enacted, that their laws, &c. should stand and continue in force, without any such certificate to be made thereof into the Chancery; and then a little after in this statute follows the clause which has been read, and that refers wholly to certificates or returns to be made into Chancery, for the purpose aforementioned. It is plain, the clause refers not to this Court, for it speaks of returning their commissions; now their commissions were never returnable into this Court; *this Court cannot be ousted of its jurisdiction without special words*; here is the last appeal, the king himself sits here, and that in person if he pleases, and his predecessors have so done; and the king ought to have an account of what is done below in inferior jurisdictions. It is for avoiding of oppressions, and other mischiefs.——
Mod. 44. pl. 98. Hill. 21 & 22 Car. B. R. S. C. accordingly. And upon reading the clause in the statute of 13 Eliz. cap. 9. Kelyng Ch. J. said, that by the statute of 23 H. 8. no orders of the commissioners of sewers are binding without the royal assent. Now this statute makes them binding without it, and enacts, that they shall not be reversed, but by other commissioners. Yet it never was doubted, but that this Court might question the legality of their orders notwithstanding. There is no jurisdiction that is uncontrollable by this Court. SIR HENRY HUNOAT's case was a famous case. and we know what was done in it.

2 Hawk. Pl. C. 286. cap. 27. S. 23. says, that a *certiorari to remove proceedings* lies to the commissioners of sewers, notwithstanding the clause in the 13 Eliz. cap. 9. Par. 5. and in the margin cites the cases above.

(F) Proceedings.

1. IF it be found before commissioners of sewers, that such a person ought to repair a bank, and this is removed into B. R. the Court will not quash this inquisition, nor grant a new trial, unless the person found guilty will repair it; and if afterwards he should be acquitted, he shall be reimbursed: but because the party would not do it, a procedendo was granted. Sid. 78. pl. 2. Trin. 14 Car. B. R. Ld. Dunbar's case.

2. By the statute 15 Car. 2. cap. 17. it is enacted, that there shall be certain commissioners, who shall have power to receive claims, concerning the fens in the counties of Cambridge, Huntingdon, &c. and to settle their bounds, and make and return their decrees into the petty-bag in Chancery. After consideration of the statute, it was resolved, that no certiorari shall be granted, and if any be, there shall be a procedendo: for it is a new judicature, and absolute in the commissioners by this new law, with which this Court has nothing to do, if they proceed according to the statute; but if not then all is void, et coram non iudice, and the parties are at liberty to examine it in an action at common law. Sid. 296. pl. 20. Trin. 18 Car. 2. B. R. Ball v. Parteridge. 2 Keb. 82.
pl. 80. S. C.

3. A certiorari was prayed to remove a presentment in Middlesex for not repairing a sewer, in regard they could not try whether the defendant ought to repair or not; but per Curiam, they may

as well try a nuisance at a leet; therefore, *without oath made by the defendant that the commissioners refused a traverse, they would grant no certiorari*, especially being on the view, and the defendant, on the distress for the fine, may try all over again here. 2 Keb. 137. pl. 1. Hill. 18 & 19 Car. 2. B. R. Commissioners of Sewers v. Wilmore.

[425] 4. Offly prayed a distringas upon the cases 10 Co. in the Isle of Ely, and to repair sea-walls in the county of Essex, which the Court denied, there being here no such judicial writ, but only on the statute West. 2. cap. . . . but only in the Chancery. 2 Keb. 255. pl. 36. Trin. 19 Car. 2. B. R. Anon. cites 37 Aff. 10. Presentments, Br. 9.

But Ibid. 5. *Where orders of commissioners of sewers are removed into B. R. by certiorari, the Court does not file them, but hears counsel upon the matter of them, before filing; for if they are good, the Court will grant a procedendo, which they cannot do after they are filed.* 1 Salk. 145. pl. 6. Hill. 11 W. 3. B. R. Anon.

file them in any case, where no apparent danger is like to ensue by the delay.—On motion to file a return to a certiorari, directed to the commissioners of sewers, the Court said, that in these cases they only make a rule to shew cause, and accordingly did so in the present case. 2 Barnard. Rep. in B. R. 151. Trin. 5 Geo. 2. 1732. Anon.

6. In cases of sewers B. R. inquires into the nature of the fact before they grant a certiorari to remove orders, that no mischiefs may happen by inundations in the mean time, but this is only a discretionary execution of their power; for wherever a new jurisdiction is erected, be it by private or public act of parliament, it is subject to the inspection of this Court, by writ of error, certiorari or mandamus. 1 Salk. 146. pl. 7. Trin. 12 W. 3. B. R. in the case of Cardiffe Bridge.

There is a rule in the Court of B. R. that no order of commissioners of sewers ought to be 7. Motion was made for a certiorari to remove up some orders of sewers, and affidavits were produced that the removing them could be of no prejudice; but, because there was not likewise an affidavit of notice of the motion given to the commissioners, the Court refused to make even a rule to shew cause. 2 Barnard. Rep. in B. R. 283. Trin. 6 Geo. 2. 1733. The King v. Butler.

filed without notice given to the parties concerned. Also it is every day's practice of that Court, before it will suffer the return of a certiorari for the removal of the orders of such commissioners to be filed, to hear affidavits concerning the facts whereon they are grounded; and if the matter shall still appear doubtful, to direct the trial of feigned issues, and either to file the return, or supersede the certiorari; and grant a procedendo, as shall appear to be most reasonable for the trial of such issues, and to give costs against the prosecutor of the certiorari, if it appear to have been groundless. 2 Hawk. Pl. C. 288. cap. 27. S. 34.

See (A) pl.
4. S. 11.—
See (C) pl. 1.

(G) Pleadings and Exceptions.

S. C. Lat.
170. by the
name of
THIRBY
V. WARR
AND SANDS,
it was
filed, that

1. **T** BROUGHT an action of trespass, 1 Car. against W. and S. for taking of his goods, &c. they justify the taking of them by authority of a commission of sewers, granted by the late King J. for a tax assessed by authority of that according to a statute 32 [23] H. 8. cap. 5. And the bar adjudged ill; because

cause they do not aver, that the assessment was in the time of the impli-
King J. For the commission is expired by the death of the king. *it was by*
And note well the clause in the statute 32 [23] H. 8. shall be in- *authority of*
tended in the time of the same king that granted the commission. *the com-*
And rule was given for judgment. Noy. 88. Trin. 2 Car. *mission of*
B. R. Tharby v. Warn and Sands. *sewers, does*
not aid the
matter, it

being on demurrer, but if the plaintiff had joined issue, and it had been found with the defendant, the implication would perhaps avail. It was answered, that this pleading is agreeable to the words of the statute. that it shall be without exposition of the circumstance, and that the statute limits the form of the replication, and that there are many precedents according to this form. Doderidge J. said, that the plea is not good at common law, nor by the statute 13 Eliz. which was an addition to 23 H. 8. in two cases, as that when the commission determines by superseas, that the laws and acts made before shall continue till repealed by subsequent commissioners. And that, when the commission expires, viz. After the end of 10 years, all laws made, &c. shall continue for one year next after. But that, in this case, the commission is not determined by any of those ways, but by the king's death: so that this case is only upon the statute of 23 H. 8. 5. He likewise held the plea ill, because it did not shew when the taxes was made; and this notwithstanding the general words of 23 H. 8. touching pleadings; for that is to the intent that [426] the officer shall not be enforced to say the particular time when the commission was granted, nor what ordinances in particular they make, &c. But for any thing appearing here, it might be, that the commission was determined before the tax assessed, and then the distress is not good; so that it is a necessary circumstance, or rather a matter of substance to mention the time. And as to the objection, that it was said to be by authority of the commission, and that thereby it is implied, that it was before the king's demise, the commission being determined thereby, and that it is a general law whereof the Court shall take notice, the Court denied it, because it is particular touching the commissioners of sewers, and the Court is not bound to take notice of it. But though the statute itself were a general law, yet the laws made by the commissioners are not so. And as to the precedents, they are all of the same kind that granted the commission. And to this Jones and Whitlock J. accorded, and rule for judgment, if plaintiff would not consent, that defendant should alter his plea.

2. Upon a certiorari to the commissioners of sewers, they made a certificate, to which divers exceptions were taken. 1st, That it appears not by the certificate, that the commission was under the great seal of England, as it ought to be by the statute of 23 H. 8. cap. 5. 2dly, The certificate does not express the names of the jurors, nor shew that there were 12 sworn, who made the presentment, as by the law it ought to be; but only quod presentatum fuit per juratores, so that there might be but two or three. 3dly, It appears by the certificate, that it was presented by the jury, that the plaintiff ought to repair such a wall, but it is not shewed for what cause; either by reason of his land, prescription or otherwise. 4thly, They present that there want reparations, but does not shew that it lies within * the level and commission. 5thly, There was an assessment without a presentment contrary to the statute, for it is presented that such a wall wanted reparation, and the commissioners assessed the plaintiff for reparation of that wall and another, for which there was no presentment. 6thly, The tax was laid upon the person, whereas by the statute it ought to be laid upon the land. 7thly, There was † no notice given to the plaintiff, which as he conceived ought to have been, by reason of the great penalty which follows for non-payment of the assessment; for by the statute the land ought to be sold for want of payment. These were the principal exceptions taken by the solicitor. Lane, the prince's attorney, took other exceptions. 1st, Because they assess the plaintiff upon infor-

* Exception was taken to an order of commissioners of sewers in the county of Nottingham; because it does not appear, that the place to be drained was within their county, or that it was an ancient

sewer; for which cause alone, the Court would not quash it without certificate that it was drained; as in case of highways; also, by Twicken, this is amendable. 2 Keb. 42. pl. 86. Pasch. 18 Car. 2. B. R. The King v. Wright. — ‡ See pl. 3.

mation; for they said, they *were credibly informed, that such a wall wanted reparation, and that the plaintiff ought to repair it*; whereas they ought to have done it upon presentment, and not upon information, or their private knowledge. 2dly, *That they assessed the plaintiff, and for not payment sold the distress, which by the law they ought not to do, for that enables them only to distrain*; and it was intended by the statute, that a replevin might be brought in the case, for it gives avowry or justification of a distress taken, by reason of the commission of sewers, and there ought to be a replevin, otherwise no avowry; and if sale of the distress should be suffered, then that privilege given by the parliament should be taken away, which is not reasonable: Keeling of the same side, and he said it was adjudged, Pasch. 14 Car. in this Court in HUNGER's case, that the certificate of the commissioners was insufficient; because that it was not shewed that the commission was under the great seal of England, as by the statute it ought to be. And the judges then in Court, viz. Mallet, Heath and Bramston, strongly inclined to many of the exceptions, but chiefly to that, that there wanted the words *virtute literarum patentium*. But day was given to hear counsel of the other side. Mar. 123. pl. 202. Mich. 17 Car. B. R. Anon.

[427] 3. W. brought *trover* against F. *for taking his cattle, &c. by warrant of commissioners, for not paying a tax set by them towards the reparation of sea-walls; the defendant pleads all the special matter, by way of justification; the plaintiff demurs, and upon the demurrer takes (among others) these exceptions to it.* 1st, To the setting forth of the commission, in that he *shews not that three of the commissioners were of the quorum*. 2dly, That in his plea he had *not set forth the authority of the commissioners*. To this the Court answered it was not necessary. 3dly, That the plea was but *argumentative*, which makes it naught. 5thly, The statute is not pleaded as it ought to be. 6thly, It does *not express, that W. in whose occupation the lands are, that are taxed, is the assignee to Lynsee the owner of the lands, but he may be a mere stranger, and so not taxable, nor his beasts to be sold*. 7thly, It is *not set forth, that he shewed his warrant before he distrained, as he ought to do*. In this case the Court first said that one may distrain, and sell the cattle of the owner of the land taxed, or his assignee, for non-payment thereof, but doubted whether a stranger's cattle might be distrained and sold. Roll J. took these exceptions to the plea. 1st, That the *plea did not set forth the limits of the commission* as it ought to do, and was therefore ill. 2dly, He said the plea ought to have shewed, that 3 of the commissioners were of the quorum. 3dly, That it did *not appear by the plea that the lands taxed where the distress was made, are within the level, to be taxed by the commissioners*. 4thly, The tax is *of the land of such an one, and his assigns, and this is too generally expressed, and cannot be levied equally by such a tax*. 5thly, The plea *sets not forth, that there was any notice given to W. of the tax made before the distress taken, as there ought to have been; and for these reasons he concluded that the plea was not good.*

Bacon

Bacon J. held first, that the party had waived his benefit of the plea given him by the statute, by pleading specially, and he ought to make good his plea, as he has pleaded it, at his own peril. He held likewise, that there ought to be *notice* given of the tax, and a demand of it, before any distress might be taken, and that the plea was defective in this. 3dly, That he cannot sell a stranger's goods for the tax, as W. is, for aught that appears in the plea. 4thly, By the plea it appears that he has *distraigned 1 acre of land for all the tax*, which ought not to be; and upon these exceptions the rule was for the defendant to shew cause before the end of the term, why the plaintiff should not have judgment. Sty. 12, 13. Pasch. 23 Car. B. R. *Whitney v. Fawcett*.

4. It was moved to quash an indictment taken before commissioners of sewers for a nuisance made in the highway, by reason of penning water in the river at his mill, whereby the water overflowing the banks did annoy the way; and he took this exception to the indictment, that it did not say it was a navigable river. But Roll J. answered, it was not necessary to say it was navigable; for if it be common passage for water, it is sufficient, and lies within the conusance of the commissioners. But Roll took another exception to the indictment, that it sets forth this overflowing of the water to be a nuisance to the highway; and for this the party is indicted, whereas commissioners of sewers have no power to meddle with such nuisance in the way, but only with passages by water. And for this cause the indictment was quashed. Sty. 60. Mich. 23 Car. *The King v. Hide*.

5. *Trespass for taking of a mare and impounding her* till the plaintiff had paid 10l. The defendant justified, that he distrained her by an order made by commissioners of sewers, for a tax assessed by them upon the plaintiff. The plaintiff demurred to this plea, and shewed for cause, 1st, That it does not appear that the commissioners who imposed the tax had authority to do it: for it ought to be done by 6 of them; and it does not appear here, that they were more in number than 4. 2dly, It does not appear that they were all of them of the quorum, as they ought to be. 3dly, There does not appear to be any default in the plaintiff, why he should be taxed. 4thly, The number of the acres of land does not appear upon which the tax was laid. 5thly, It does not appear, that the land taxed did lie within the jurisdiction of the commissioners. Upon these exceptions the plea was over-ruled. Sty. 178. Mich. 1649. *Brungy v. Lee*.

6. Upon a rule to shew cause why an attachment should not issue forth against commissioners of sewers in Suffolk, for setting a fine upon one for not obeying their orders after a certiorari was delivered unto them to remove the orders made against the party in contempt of this Court, it was shewed for cause, that the fine set was for disobeying a new order of theirs made against the party after the certiorari was returned, and not for disobeying the orders removed by the certiorari: and so it was no contempt to this Court. Roll Ch. J. said, the certiorari does not remove the commission of sewers; and therefore they may proceed upon the commission notwithstanding the certiorari; therefore let no attachment issue against

against them. Styl. 445. Pasch. 1655. *The Protector v. Bruster.*

7. It was moved to quash an order of the commissioners of sewers of Bromley Marsh; 1st, Because *made on a bare suggestion of one of the commissioners.* 2dly, *None of the quorum are mentioned.* 3dly, *It is not alleged, that the defendants are chargeable;* and that the order is *felo de se*, because it is *said, that if J. S. only shall repair, he shall have 10l. allowed him in respect of 80 that he has expended.* It was said e contra, that the order is good, and this suggestion is but a complaint which may be made by any; and if a private man makes it of his own head, yet the commissioners may allow his expence: and though J. S. ought to repair, yet he was not bound to make it so ample; also Bromley would have a profit by it, (and Twisden agreed, that *contribution shall be made by him that has any manifest benefit, but this must be on presentment of the jury*) and although any 6 may make a presentment as well upon their own view as when by a jury, yet here the persons appointed shall not make it. It was further objected, that this is done by the commissioners after that J. S. of his own head has repaired the breach: yet per Curiam, the danger being apparent, and of necessity to be amended, as a house may be pulled down on danger of fire; and the order recited this, and the benefit of the marshes thereby; wherefore the award was respited until view of a copy of the order. Windham J. said, that the *commissioners of sewers shall have as much favour as may be*, and they would not quash it. 1 Keb. 4. pl. 9. Pasch. 13 Car. 2. B. R. *The Inhabitants of Bromley and East-Marsh at Blackwell.*

8. The forms of commissioners of sewers are *not so strict as indictments.* Sid. 78. pl. 2. Trin. 14 Car. 2. B. R. Lord Dunbar's case.

9. Exceptions were taken to an order; 1st, Because the order, reciting that *J. S. had a mill*, was to compel him to repair the floodgates; whereas it does not appear that *J. S. had any estate in the mill.* 2dly, It was that *the holes of the floodgates should be of less size than before*, which according to Chester Mill's case is not good. But per Cur. the order, notwithstanding these 2 objections, shall be confirmed; for whoever is owner of the mills, *whatever his estate be, ought to repair the floodgates; and they shall not be intended to have been mills before the time of E. 1.* Sid. 145. pl. 1. Trin. 15 Car. 2. B. R. *Oldbery Inhabitants v. Stafford.*

10. Another exception was, that they ordered the millers, who disobeyed their orders, *to be imprisoned*, which is contrary to Magna Charta. As to this, the Court held the order void; for though the commissioners of sewers, being a Court of record, may imprison one for a contempt to them committed, yet they cannot imprison one *for disobeying their order*; and as to the contempt, it is intended of a *contempt committed in their presence.* And so they held, that the order may be confirmed in part and made void in part. Sid. 145. pl. 1. *Oldbery Inhabitants v. Stafford.*

11. Exception

11. Exception was taken to a decree of commissioners of sewers, because *it was to charge a town adjacent ; and do not shew they had any damages thereby.* Per Cur. it was quashed, nisi. 2 Keb. 42. pl. 85. Pasch. 18 Car. 2. B. R. The King v. Wright.

* 12. A *certiorari* was prayed to remove the *aēt* of parliament and their proceedings, which are absolute, without appeal ; *suggesting only, without affidavit, that they had proceeded unreasonably ;* which the Court granted as the right of the subject, as on commissioners of sewers, and orders of justices for bastard children, which are without appeal ; yet *this Court may judge whether they have pursued their power, which they must take according to their return.* 2 Keb. 43. pl. 87. Pasch. 18 Car. 2. B. R. The King v. the Commissioners of Fens.

13. A *certiorari* to remove an order of sewers was moved for, because they had *charged the plaintiff alone to the repair of a new sea-wall made for security of an ancient wall, and this without presentment ;* which the Court conceived ill, and that such persons were chargeable to the new wall that should repair the old ; but they directed the plaintiff to make *affidavit, that there was no danger in the wall, or that it was in repair.* 2 Keb. 129. pl. 85. Mich. 18 Car. 2. B. R. The King and Day v. the Commissioners of Sewers.

14. Exception was taken to an order of the commissioners of sewers *for the defendant to account for money received as treasurer in 1646, on a breach then made and repaired ;* because it appears judicially this is *above 10 years ago, and in another king's time :* also this is not to account for any tax for the benefit of the country, but of particular persons and townships, that lent it in the present exigence, *sed non allocatur ; for albeit new commissioners cannot go on where the others left off, yet they may resume the thing ;* and this was the chief point in WARNE's case, and that the commission was determined by the king's death. The Court ordered the counsel to move again. Twisden said, it had been held no traverse could be taken to this matter by an *onerari non debet ;* but per Windham, the Court do often order an action *sur case* to be brought at law. But adjournatur. 2 Keb. 180. pl. 3. Pasch. 19 Car. 2. B. R. The King v. Pratt.

The Court conceived the new commission of sewers may call to account for time of other commission, and they conceived this money publick ; and albeit the party may go into the Chancery, yet they may proceed here, but the new commissioners cannot graft on the old one's process ; and per Cur. (Keeling Ch. J. absente) a *procedendo* awarded. Coleman prayed, that there might be a trial here by a feigned action ; which the Court denied in cases, as this is, of account, or such like, where no freehold is in question ; but after on Friday, May the 17th, they granted it. 2 Keb. 220. pl. 66. Pasch. 19 Car. 2. B. R. The King v. Pratt.

15. Exception to an order of sewers was, *that there was an order of respite to 1 May 1666, and till farther order, and in the mean time a pain is set, viz. In March ; and 2dly, The plaintiff is to do iron work after stone work shall be done by others, and they have not yet made the stone work ;* therefore cannot compel the plaintiff. 3dly, *It is said, the king or his tenant ought to repair in pain of 100l.* But per Curiam, (Keeling absente) they will not *quash*

quash orders of sewers for such exceptions that are only misleading; but the party distrained may replevy; but if they lay a pain on one which should be laid on whole townships or such matters of title, this may be sufficient to quash them, but not such exceptions; and the Court refused to file the return on the certiorari before they heard the exceptions, nor would they meddle in it then, but sent it back. 2 Keb. 339, 340. pl. 7. Pasch. 20 Car. 2. B. R. *The King and Heart v. Commissioners of Sewers of Lincolnshire.*

16. On return of the commission exception was taken, that the decree was for the straightening of the publick stream, whereby the meadows of A. & B. could not be overflowed as usual; which is only a private damage, for which action upon the case lies: and per Curiam, the commissioners cannot meddle with it, unless it be a publick prejudice as well as a publick stream; but the decree being to reimburse the expeditor, albeit this be but of the same effect as the decree of the prejudice, yet adjournatur. 3 Keb. 446. pl. 2. Pasch. 27 Car. 2. B. R. *The King v. Vachel.*

[430] 17. In replevin the defendants avowed the taking under a warrant from the commissioners of sewers. It was objected, 1st, That the defendants ought to produce the inquisition, which is necessary to be taken by the commissioners before any warrant can be made out; but the judge did not allow of this objection. 2dly, That the warrant appeared to be illegal upon the face of it; for it required the defendants to levy a certain penalty upon such persons as should refuse to pay the rate, and did not mention the names of these persons. This objection the judge allowed of; accordingly the plaintiff was nonsuited. 2 Barnard. Rep. in B. R. 321. Trin. 6 Geo. 2. 1733. *Farr v. Crisp & al.*

18. On a rule to shew cause why a certiorari should not go to remove up certain orders made by the defendants, an affidavit was produced, that the place, which the orders related to, was not repaired, but continued a great nuisance to the inhabitants of the town. But the Court was of opinion, that this affidavit was not sufficient, by reason it was not sworn in it, that this place was a nuisance to the country in general. Accordingly (Chief Just. absente) the rule was made absolute. 2 Barnard. Rep. in B. R. 379. Hill. 7 Geo. 2. 1733. *The King v. the Commissioners of Sewers in Lincolnshire.*

For more of Sewers in general, see Nuisance? and other proper Titles.

Sheriff.

(A) His Power as to Arrests, and detaining Prisoners.

1. **I**F a *capias* comes to the sheriff, and there is no original, yet if he serves it, he is excusable in false imprisonment. D. 61. pl. 26. Trin. 38 H. 8. in Trewynard's case. Brownl. 210. Mich. 5 Jac. Buckwood v. Beale

says, it was said accordingly by the Court; for he is not to examine whether the original be sued out or not, and cites Trewynard's case.

2. The better opinion was, that if *process* was delivered to the sheriff, and he takes the party without saying any thing, that yet it is good; for otherwise the sheriff shall be a trespassor, which the law does not intend; and the sheriff hath a lawful authority so to do. So also it is although the sheriff had not the *process* about him at the time of the arrest. Noy. 55. Beale v. Taylor.

3. Sheriff may keep prisoners where he pleases, if they are not malefactors, and such for whose escape he must answer. Per Rooksby J. Cumb. 403. Hill. 9 W. 3. B. R. The King v. Tyrrel. [431] In case of a common arrest, the officer may make any

place his prison, because the writ is, *ita quod habeas corpus ejus coram, &c. apud Westm.* which is a general authority; but where it is a special authority to take him and carry him to the Compter, it is otherwise. 1 Salk. 408. pl. 3. Trin. 8 W. 3. B. R. Swinsted v. Lyddall.

4. If a writ is actually sued out, though the sheriff makes a warrant before it comes to his hands, yet it is lawful; 2 Lutw. 1287. Mich. 10 W. 3. Redman v. Idle. And cites Saund. 299. the case of GREEN v. JONES, that it shall be intended the writ was delivered to him before the arrest.

(B) His Power as to raising the Posse Comitatus.

See Return (H) pl. 2.

1. **I**F rescous be made to the sheriff in making execution upon a fine, he ought not to stay and return the rescous, but may take posse comitatus, and make execution. Br. Return de Briefs, pl. 26. cites 19 E. 3. and Fitzh. Execution, 247.

2. An officer may carry 300 men, with barnes and guns, to serve replevin; quod nota. Br. Office and Off. pl. 23. cites 3 H. 7. 1. Br. Return de Briefs, pl. 85. cites S. C. & sic

de similibus, ——— Br. Trespass, pl. 266. cites S. C.

3. The

Br. Riots,
pl. 2. cites
S. C.

3. The statute of *Marlebridge*, cap. 21. and the *statute of Westminster* 2. cap. 39. are, that after complaint made to the sheriff he may take the power of his county, and shall make replevin. And per Cur. he may serve process with power by the common law, and the statute in the affirmative is not against it. Br. Parliament, pl. 108. cites 3 H. 7. 2.

And every
man is
bound by
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mon law
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4. By the order of the common law, and statutes of the realm, the sheriff, or other minister of the king in execution of the king's writs, or process of law, might after resistance take posse comitatus. 3 Inst. 161.

only the sheriff in his office for the execution of the king's writs (which are the commandments of the king) according to law, but also his bailiff, that has the sheriff's warrant in that behalf, has the same authority, which his master the sheriff has; for the sheriff cannot do all himself, and if they do it not, being required, they shall be fined and imprisoned. 2 Inst. 193.——S. P. Br. Trespass, pl. 266. cites 3 H. 7. 1.

5. If any man, how great soever, might have resisted the sheriff in executing the king's writs, then had it been a good return for the sheriff to have returned such resistance; but as the statute of *W. 2.* says, *quod hujusmodi responsio multum redundat in dedecus domini regis & coronæ suæ*, and that which is in dedecus domini regis, &c. is against the common law; therefore of necessity, if need be, for the due execution of the king's writs, the sheriff may, by the common law, take the posse comitatus to suppress such unlawful force and resistance. 2 Inst. 193.

6. All knights, gentlemen, yeomen, labourers, servants, apprentices, and villeins; and likewise wards, and other young men that be above the age of 15 years, because all of that age are bound to have harness by the stat. of Winchester, and shall be compelled to attend: but not women, ecclesiastical persons, and such as be decrepit, or do labour of any continual infirmity. Lamb. Eiren. lib. 3. cap. 1.

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7. It is said a sheriff, who cannot do execution by a posse comitatus, ought to acquaint the deputy lieutenants of the county; and if they assist not he must acquaint the king and counsel; and yet the sheriff shall be amerced, if he return that he cannot do execution. 1 Keb. 99. pl. 91. Trin. 13 Car. 2. B. R. Bush v. Chamberlain.

8. Upon a resistance of execution, the counsel-table refused to meddle, because this Court ought to see their own judgments executed; and Finch prayed a writ to the high sheriff (which all writs are) but with a special rule that the high sheriff should execute it himself; which the Court granted, and a tipstaff to fetch the under sheriff up to return his writ, which is better than an attachment, which is returnable by itself. 1 Keb. 117. pl. 22. Mich. 13 Car. 2. B. R. Bush v. Chamberlain.

(C) Power as to *breaking open Houses, Chests, &c.* See House (B)

1. **T**HE sheriff cannot break open a *house or chest* to do execution *by fieri facias*; per Cur. but he may take the goods or body for execution. Br. Trespas, pl. 390. cites 18 E. 4. 4. Br. Execution, pl. 100. cites S. C. accordingly, and the party

may have trespass against the sheriff for so doing. But Ibid. cites Fitzh. Execution, pl. 158. H. 18 E. 2. contra.

Though a sheriff cannot break open the door of a house to make execution upon the goods of the owner or occupier, yet *to make execution on the goods of a stranger*, he may upon request, and denial to open them; for a man's house shall be protection for his own goods only, but not for the goods of another. 5 Rep. 93. a. Mich. 2 Jac. B. R. the 5th resolution in Semaine's case.

In trespass for entering his close and breaking his barn, defendant pleaded that he entered by virtue of a *feri facias*, the door being open, and took the goods in execution; the plaintiff replied that the door was shut. Adjudged that a *barn adjoining to, and parcel of a house*, cannot be broke open upon a *feri facias*, without a request first made; but a barn *in a field* may be without request, to take goods in execution. Windham J. inclined that it was not traversable whether the door was open or shut; and therefore the replication to that purpose was idle. Sid. 186. pl. 11. Pasch. 16 Car. 2. B. R. Penton v. Brown. — 1 Keb. 698. pl. 22. S. C. accordingly.

But Hill. 31 & 32 Car. 2. B. R. it was agreed per Cur. that on a *feri facias*, when the officers are once *in the house*, they may break open any chamber-doors or trunks for doing their execution. 2 Show. 87. The King v. Bird.

2. It is not lawful upon a *capias excommunicatum*, nor for any other cause, unless for felony or treason, for any person to break a house *in the night*. Per tot. Cur. clearly. Cro. E. 742. pl. 17. Hill. 42 Eliz. C. R. Smith v. Smith.

3. An *attachment* is a non omittas in itself, and therefore the sheriff may *break* the person's *house* to take him; for the writ is for his person. Roll R. 336. pl. 49. Hill. 13 Jac. B. R. Brigg's case.

4. In trespass *quare clausum & ostium fregit & domum intravit, & seras fregit, &c.* The defendant justified as under sheriff, and that a *feri facias* was directed to the *sheriff, &c.* to take the plaintiff's goods in execution, and that he *made a warrant to 5 of his bailiffs, &c. who* finding the outward doors of the plaintiff's house open, they *entered, and* that the *plaintiff shut the door upon them, and detained them for 4 hours, and that he, to deliver them, broke open the door; and* that afterwards he *being peaceably in the house, broke some of the inner doors to make execution of the writ, having found the outward doors open, &c.* The plaintiff demurred; Mountague Ch. J. and Doderidge and Haughton J. absente Crooke, held the justification good; for when once an execution is lawfully begun, the sheriff and his officers may proceed: and here it was lawfully begun; for the outward doors were open, and the *bailiffs entered the house lawfully, and the resistance afterwards was a resistance against the law and the justice of the realm; and having well commenced the execution, they might proceed in it, and remove all obstacles which might retard the execution. 2 Roll. Rep. 137. Mich. 17 Jac. B. R. White v. Wiltshire.

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Palm. 52. S. C. accordingly, only mentions that the bailiffs were imprisoned there for 24 hours. — Cro. J. 555. pl. 19. Anon. but is S. C. adjudged for the defendants; and in regard this restraining of the execution, and detaining of the bailiffs was confessed by the demurrer, as

attachment for the good behaviour was awarded against the plaintiff. Cro. mentions the detaining the bailiffs to be for 2 hours,

5. Upon

5. Upon a *capias utlagatum*, though on mesne process, and at the suit of a subject, the officers may break open any outward doors after demand and refusal. 2 Show. 87. Hill. 31 & 32 Car. 2. B. R. The King v. Bird.

(D) Power to make a Deputy, and what he may do by Deputy.

1. **W**HERE writ of enquiry of waste is awarded to the sheriff of land within the franchise, the sheriff ought to enter the franchise and execute it; for he is judge and officer by the statute, quod accedat ad locum vastatum, &c. and if he returns mandavi ballivo he shall be amerced. Br. Process, pl. 37. 11 H. 4. 82.

* An *accedas ad curiam* was delivered by the sheriff's bailiffs, and the steward of the hundred Court refused to allow it, because the sheriff came not in propria persona.

2. If a writ of partition be awarded, the sheriff must be upon the land in person, at the time when the partition is made, and it is not sufficient that the under sheriff be there; and upon examining the under sheriff, who confessed that he *was there, but not the sheriff himself*, the writ, not being returned, and filed, was stayed, and a new writ was awarded: and the justices held the law the same in all cases where the words of the writ are, that the sheriff shall go in his own person, as in an * *accedas Curiam, waste, redisseisin*, if exception be taken at bar before the return of them be received. Cro. Eliz. 9, 10, pl. 1. Mich. 24 & 25 Eliz. in C. B. Clay's case.

Aud this case being cited, the prothonotary informed the Court, that the constant practice is for the sheriff to send it by his bailiff. And they took a difference between a *redisseisin*, and *partition*, &c. where the sheriff is judge, and this and other cases where his office is but ministerial. And Judge Wylde said, there may be great inconveniencies if the sheriff must go in person; as if he should have several writs of *accedas ad Cur.* directed for several Courts at great distance kept the same day, it would be impossible for him to execute them; and whereas it was objected, that the words of the writ are quod accedat in propria persona, &c. It was answered, that in many cases the execution of writs vary from the verbal direction of them, as to chuse parliament men, the writ is duo milites, &c. and yet good esquires do very well serve the turn; and so the writ of right is 24 milites, and yet other persons will serve; and so in this writ it is assumptis tecum 4 militibus, they need not be knights. Nat. Brev. 18. And the steward was ordered to take care that the party had restitution of his money taken upon the execution, or otherwise they would grant an attachment against him for disobeying the writ. And cited Lady WINTER's case in Trin. Term last where a partition was made by the under sheriff; and because there could be no objection against the equality of it, the Court would not award a new writ. Freem. Rep. 52, 53. pl. 65. Mich. 1672. in C. B. Lacy v. Harris.

It was resolved, that the sheriff may serve an *accedas ad Curiam* by his servant; and so Hale said, it had been formerly resolved in one BARRELL's case. Freem. Rep. 355. pl. 445. Mich. 1673. Anon.

3. In a writ of enquiry of damages in dower the sheriff made a warrant to W. to take the inquest. Anderson and Walmesley J. were of opinion, that in this case he cannot make a deputy, because it is a *judicial act*, which he ought to do in person, and differs from that where they serve process as a servant. Noy 21. Bandal's case.

(E) His

(E) His Power in Executions; and how he must Demean.

1. **T**HE sheriff, by virtue of a *ca. sa.* took J. S. who paid the sheriff the money, and thereupon the sheriff discharged him. Afterwards J. S. was arrested on a new *ca. sa.* and brought false imprisonment against the bailiff. Fenner J. and Popham Ch. J. held, that the sheriff could not discharge J. S. on his payment of the money to him; and that the bailiff was guilty of no tort in detaining him upon this 2d arrest; but Gawdy and Clench held, that in regard it was but a writ of execution, and to have the money in Court, therefore he ought not to have arrested J. S. a 2d time, and that the bailiff might have discharged him; and cited 33 H. 6. 48. Per Danby. 13 H. 7. 16. 21 H. 7. 23. Cro. E. 404. pl. 13. Trin. 37 Eliz. B. R. Stringar v. Stanlock.

S. C. cited Lutw. 588. in the case of Langdon v. Wallis, agreeable to the opinion of Popham and Fenner. And the Reporter says, that he cannot find any thing in 13 H. 7. 16. and 21 H. 7.

23. which were cited by Gawdy and Clench tending to this matter; and that the opinion of Danby in 33 H. 6. 48. cited by them, is, that Danby says that the taking the body in execution is no satisfaction to the plaintiff, but if he will satisfy him, then it is not reasonable that he should be imprisoned by the writ, the which may well be intended that if he satisfies the plaintiff in the action before the arrest, then it would not be reasonable to arrest him.

2. Where the sheriff has process of extent upon a statute staple out of Chancery of goods and lands, he may collect the goods together, and put them in a room, before he makes an inquisition, though the words of the writ are *per sacramentum proborum & legalium hominum extendi & appreciari, & in manus nostras seifiri, facias*; and after he has collected them together, he may then bring 12 men to view and appraise them; but the final power of seizure for safe custody is given after inquiry. Mo. 563, 564. pl. 768. The Attorney General v. Croker, &c.

3. It was held by the Court, that if a *fieri facias* go to the sheriff to do execution, and he levies the money, and delivers the same to the party: yet if it be not paid here in the Court, the party may have a new execution; and it shall not be any plea to say, that he has paid the same to the party; for it is not of record without bringing of the money into Court. Godb. 147. pl. 188. Pasch. 3 Jac. in C. B. cites 11 H. 4. 50.

But 2 Show. 87. pl. 78. Hill. 31 & 32 Car. 2. B. R. The King v. Bird, it was resolved by the Court

on motion, that on a *fi fac.* the sheriff may sell the goods, and if he pay the money to the party it is good, and the Court will allow of such return, because the plaintiff is thereby satisfied, although the writ run, *ita quod habeat coram nobis, &c.*

Upon a judgment in the County Court, it was (among other things) objected that the money ought not to have been paid by the bailiff to the plaintiff, but that he ought to have returned it into Court; and as to this exception, the Court was not well agreed; for the precept is, *ita quod habeam denarios illos ad reddend. to the plaintiff*; to which it was said by some that so the writs are in this Court, and yet the sheriff when he has levied the money pays it to the plaintiff, and if he does not so, this Court often compels him upon motion to pay it to the plaintiff. But on the other side it was said, that this was by permission of the Court, and not *ex rigore juris*; and that oftentimes the Court here orders the sheriff to bring the money levied into Court, of which power the Court by this means will be deprived. 3 Lev. 204. Mich. 36 Car. 2. in C. B. Cannon v. Smalwood.

4. If *procefs* comes to a sheriff to make execution of the goods of J. S. and he makes execution of the goods of J. N. he is trespassor; for he must take notice at his peril; for otherwise he makes execution without warrant; but if there be any *fraud* in the matter he may aver it. Brownl. 210. Mich. 5 Jac. Buckwood v. Beale.

But if a fi. fa. be awarded for 40s. by force of which the sheriff takes 5 oxen, every one at the value of 5l.

* 5. If a *fieri facias* for 20l. be awarded to the sheriff, upon which he takes an entire chattel, and sells it for 40l. and returns the *fieri facias* with the 20l. in Court; he may detain the *surplusage* until the defendant comes to demand it of him; for he is not bound to search out the defendant. Agreed. Noy 59. Wooddye v. Coles.

and sells them all, it is clear that the defendant shall have an action of *trespass* against the sheriff; which was agreed. Noy 59. Wooddye v. Coles.

S. C. cited Lutw. 589. in the case of Langdon v. Wallis. Arg. and says, that the law requires of sheriffs a strict execution and observance of the writs of the king directed to them, and

6. In *detinue* the case was thus. A. had recovered in debt against W. and execution awarded to the now defendant, being then sheriff of Southampton; who takes the goods, &c. and returns a *fieri feci & denarios habeo*, but none of the goods were sold before the return, but the sheriff kept them in his hands; and judgment now for the plaintiff; for the sheriff cannot detain the goods taken upon an execution in his own hands, and satisfy the debt of his proper money; but he ought to sell them upon a *venditioni exponas*, and may return upon his so doing, *quod non invenit emptores*; for a grand inconvenience would ensue, if the sheriff himself might detain them. Noy. 107. Trin. 2 Jac. C. B. Waller v. Weedale.

that the case of Waller v. Weedale was adjudged upon this reason: and that for the same reason it has been adjudged that a sheriff cannot deliver the goods by him taken in execution upon a fi. fa. to the plaintiff in satisfaction of his debt, and cites * Cro. E. 504. Thompson v. Clerk and 2 Vent. 93. Bealy v. Sampson. — In the case of Sprake v. Richards. Hob. 207. at the end. Hobart Ch. J. moved a question, that if a sheriff having a fi. fa. or a ca. fa. pay the plaintiff his debt with the sheriff's own money, whether he may now levy the money of the defendant afterwards.

* Cro. E. 504. pl. 28. Mich. 38 & 39 Eliz. B. R. — Noy 56, 57. S. C. — S. C. cited by the Ch. J. 2 Vent. 95. in the case of Bealy v. Sampson, and said, that neither ought the goods to be delivered to the defendant against whom the execution is, but they ought to be sold.

7. On a *fieri facias* the sheriff may return that he has the goods in his hands. *Pro defectu emptor.* and then a *vendit.* exp. goes commanding him to sell them at the best rate he can, and he must not appraise them too high; for if he values such so high as none will buy them at the rate he must himself. Yet if defendant before the sale, or any other person for him tenders the money to him he cannot sell them. 2 Show. 87. pl. 78. Hill. 31 & 32 Car. 2. The King v. Bird.

8. Upon a *fieri facias* there need not be any appraisement; but upon an *elegit* the goods must be appraised. Per the Ch. J. 2 Vent. 95. Mich. 1 W. & M. in C. B. in the case of Bealy v. Sampson.

9. A rule of Court was for the sheriff to shew cause upon his personal attendance, why he should not pay money levied on execution: and upon *affidavit of service* it was moved for a new rule absolutely

absolutely to pay the money, let the Court deal with him as they pleased for the contempt; but the affidavit being defective, they were ordered to amend it. 12 Mod. 349. Pasch. 12 W. 3. Sprag v. Richardson.

10. The sheriff took goods upon a fieri facias, and a stranger promised the officer to pay him the debt in consideration he would restore the goods. Upon a demurrer this was argued and compared to a consideration to suffer a prisoner to escape; but Curia contra; by the capias he is to take and keep in salva custodia, and giving liberty is contrary to the writ, but that is now to raise the money, and the sheriff upon a fieri facias may sell the goods, and this is no more in effect. 1 Salk. 28. pl. 17. Pasch. 5 Ann. B. R. Love's case.

(F) *Payment of the Money to the Sheriff.* Good, [436] or not.

1. PLAINTIFF in *detinue* had judgment, and upon a *scire facias* after the year to have execution the defendant pleaded that upon a *distringas* to the sheriff upon that judgment he delivered such goods to the sheriff; and for the residue that they were appraised at so much by an inquisition taken by the sheriff, to whom he delivered the money, but did not aver this matter to be returned by the sheriff. Exception was taken that this was not a plea to extort execution upon such a surmise; and Popham Ch. J. was at first of that opinion; for then by such feigned plea one that has judgment to recover a debt shall never have execution, but Gawdy contra; for otherwise the defendant should be prejudiced; because he might have 20 several executions served against him upon one judgment, and be put to his remedy against the sheriff only, who might be worth nothing, and the mischief is less to enforce the plaintiff, if the plea be true, to sue the sheriff, and if not true, to take issue thereupon; and upon its being moved again, all the Court was of that opinion. Cro. E. 390. pl. 13. Pasch. 37 Eliz. B. R. Atkinson v. Atkinson.

2. Payment to the sheriff upon a * *feri facias* is a good plea, because he hath authority to levy the debt; but payment upon a † *ca. sa.* perhaps is not, because he is only to detain the body in prison till he has paid the debt to the plaintiff. 2 Lev. 203. Trin. 29 Car. 2. B. R. in the case of Taylor v. Bekon.

2 Jo. 97. Taylor v. Baker, S. C. But nothing is said there as to this point by the

Court.——S. C. 2 Mod. 214. but S. P. is not taken notice of by the Court.——Freem. Rep. 453. pl. 618. S. C. says, the Court inclined, that a sheriff upon a *ca. sa.* could not receive the money so as to discharge the party; but if the sheriff should prove insolvent, he might resort to the party again; but it is otherwise upon a *fi. sa.* though that was long doubted; but that is to levy the money, but the *ca. sa.* doth authorize him only to bring the body into Court.

* S. P. 2 Show. 140. pl. 116. . . . v. Morton.

Payment to the officer or sheriff would not be good unless upon a *fi. sa.* and then payment to the sheriff would be good. Skin. 665. Mich. 8 W. 3. B. R. in the case of Swinhead v. Liddal, 5 Mod. 296. S. C. & P. Per Cur.——1 Salk. 408. S. C. but I do not observe S. P.

† The payment in such case is not good; for the sheriff by that writ had only authority to take his body and not his money; but payment to the plaintiff's attorney on record is a good payment to the plaintiff himself. 2 Show. 139. pl. 116. Mich. 32 Car. 2. B. R. . . . v. Morton.

Debt upon a judgment, the defendant pleaded, that he was taken in execution by *ca. sa.* upon that

that judgment, and had paid the money to the sheriff; and it was held to be no good plea, because though he does pay it to the sheriff, yet the sheriff may be insolvent, or may die and leave no assets, and then the party will be never the better; and so it was held lately in this Court in one **BAKER's** case, who pleaded payment to the marshal, being in execution in the Marshalsea, and held to be no good plea. Jud. pro quer. Freem. Rep. 482. pl. 659. Mich. 1680. in *B. R. Stamford v. Davies*.

So where one was taken by a *ca. sa.* and thereupon assigned a mortgage to the under sheriff to secure the payment of the money, who then set the defendant at liberty. This was held per tot. Cur. to be an escape in the sheriff; and to prove this it was said by the defendant's counsel, that the sheriff upon a *ca. sa.* had no authority to take this mortgage, and discharge the prisoner; because the writ is *quod capias* the defendant & eum salvo custodias ita quod habeas corpus ejus such a day coram justiciariis such a day ad satisfaciendum eidem, the plaintiff, &c. Lutw. 587. Hill. 9 W. 3. *Langdon v. Wallis*.—S. P. Per Cur. 12 Mod. 385. and cites it as adjudged in the Sheriff of Wiltshire's case.

3. The sheriff has no power to receive money from the defendant upon a *capias*; for his business is only to execute his writ: and if in such case a defendant pays the sheriff, and he after becomes insolvent, and does not pay the plaintiff, such payment shall not excuse the defendant. Per Holt. 12 Mod. 230. Mich. 10 W. 3. Anon.

[437] (G) How he must demean in Case of Injunctions as to Executions.

1. **SHERIFF** on a *fieri facias* levied the debt; the defendant brought a bill in Chancery, and got an *injunction to stay the money* in the sheriff's hands. The plaintiff and his attorney (both prisoners in the Fleet) move the Court against the sheriff to return the writ, the sheriff prayed the direction of the Court; for if he return the writ he must pay the money, and then he shall be committed by the Chancery for breach of injunction, and if not, then the King's Bench will amerce him. The Court took no notice, but ordered a return, or they would commit him, nor would they any way assist him. 8 Mod. 315. Mich. 11 Geo. *Wilson v. Aldridge*.

See (E) (H) Sale by Sheriff. How, and to whom.

Cro. E. 584. pl. 13. Mich. 39 & 40 Eliz. B. R. *Palmer v. Humphrey*, S. C. states it upon an *elegit*, and said that there is a difference between a sale upon a *fieri facias*, and on an *elegit*; for the *elegit* is *quod per sacramentum et proborum hominum per rationabile pretium & extensum*, &c. And that the jury thereupon impannelled found a lease commencing 2 & 3 P. & M. whereas in *ejectment* afterwards it was found by especial verdict, that notwithstanding such finding of the jury impannelled by the sheriff upon the *elegit*, it really commenced 3 & 4 P. & M. And *Popham* held the sale void, because without an inquisition the sheriff cannot sell; and this was agreed by all the justices; but if

1. **I**F upon a *fieri facias*, the sheriff by writing, reciting that the defendant has a term for years, and shews what, and that it commenced the 2 & 3 P. & M. where it commenced the 3 & 4 P. & M. he sells the said term, this is a void sale; for there is no such term; but if notwithstanding this false recital he had sold also all the interest which the defendant had in the said land (as here he did) this sale is good. Resolved per tot. Cur. 4 Rep. 74. 2. Hill. 39 Eliz. B. R. *Palmer's case*.

the

the inquest finds one thing, and he sells another, as in this case the term found commenced a & 3 P. & M. so that this sale is not warranted by the inquest, and consequently void. But if they had found that he was possessed of such land for a term of divers years yet to come, which they appraised at so much, without shewing any certain beginning or end thereof, it had been well enough; for they are not compellable to find a certainty, having no means to be informed thereof. — Goldsb. 172. pl. 105. S. C. according to Cro. E. — And 4 Rep. 74. b. says that it was afterwards found by the Attorney General, upon perusing the record, in compassion of the defendant, a poor man, that the execution was by force of an elegit; and thereupon the sale was adjudged void, and judgment given accordingly. — In this case, as mentioned in all the said books, was cited the case of Sir George SYDENHAM v. ROLLS, where an inquest upon a fieri facias found, that the defendant against whom, &c. was possessed of such a term bearing date, &c. (whereas in truth it did not bear the same date) and the sheriff sold the same term, that the sale was not good. And then the Court directed the sheriff, that upon a new fieri facias it should be found, that he was possessed of a lease for years generally, yet continuing, and that he sold it, &c. And it would be well enough. Mich. 32 & 33 Eliz. in the Exchequer.

2. A sale of a term of tithes made *upon an elegit to the plaintiff himself* shall not bind the defendant when the execution is reversed in error. Per tot. Cur. for there is a difference between this sale and delivery upon an elegit to the party himself, and a sale to a stranger upon a fieri facias; for the fieri facias gives authority to the sheriff to sell, and to bring the money into Court: wherefore when he sells a term to a stranger, although the execution be reversed, yet he shall not by virtue thereof be restored to the term but to the monies, because * he comes duly thereto by act in law; but the sale and delivery of the lease to the party himself upon an elegit, is no sale by force of the writ delivered in extent, which being reversed, the party shall be restored to the term itself: wherefore the execution was reversed, and a writ of restitution awarded. Cro. J. 246. pl. 4. Trin. 8 Jac. B. R. Goodyere v. Ince.

Brownl. 108. S. C. for he being the party himself, it is in law but a bare delivery in specie, and therefore ought to be restored in specie again, and does not absolutely alter the property, but attends upon the execution

to be good or naught, as the execution is; and says that so it was adjudged before in Robotham's case, and in Woorel's case (as Mr. Noy said to Yelverton.) — S. C. Yelv. 179, 180. accordingly, and the one seems to be copied from the other.

3. Sheriff cannot deliver a lease upon an elegit at another value than what the jury had found it at; and sale made by him is as good as if made in market overt. Brownl. 38, 39. Comins v. Brandling.

[438] Mo. 873. pl. 1216. Hill. 11 Jac S. C. but S. P. does not appear.

4. Under sheriff, on a fieri facias, persuaded the jury to prize the goods at an under value, persuading them it would be better for the poor man the defendant; so that they appraised them, though worth 80l. at 22l. 13s. 4d. and he delivered them to the plaintiff for the said sum; this is oppression, and inquirable at the assizes by indictment. Cro. J. 426. pl. 12. Pasch. 15 Jac. B. R. Sayr's case.

5. Where the sheriff sells the thing on a venditioni exponas under the value, there he shall be discharged; but otherwise where he sells the goods ex officio. Per Doderidge J. Godb. 276. pl. 390. Hill. 16 Jac. in Slye's case.

6. Adjudged that where a sheriff takes goods in execution, he may sell them at any rate, if the defendant refuse to pay the debt. Vent. 7. Hill. 20 & 21 Car. 2. B. R. Anon.

So if goods are seized by virtue of a levary

facias upon a judgment in an inferior Court, the bailiff may sell them at any price which was offered to him. 2 Lutw. 1446. 8 W. 3. in case of Clerk v. Lockey.

7. On a fieri facias goods may be sold to the plaintiff who sues out the writ, though not actually delivered to him. Cumb. 452. Trin. 9 W. 3. B. R. Anon.

8. If an officer that has power to sell, sells *upon credit* when he may sell for ready money, he is thereby immediately charged to the party for whom the sale was. 6 Mod. 83. Mich. 2 Ann. B. R. Morley v. Staker.

(I) Venditioni Exponas.

1. **W**HERE sheriff upon a fieri facias returns, that he has seized goods *ad valentiam* 260l. but that they were rescued from him; the Court cannot in this case award a venditioni exponas, because it appears that the goods are out of his hands. 2 Saund. 344. Pasch. 23 Car. 2. B. R. in case of Mildmay v. Smith, cites 34 H. 6. 36. a.

* 11 Mod. 36. in case of Clerk v. Withers, cites 2 Saund. 343.

2. If a sheriff return goods *levied to such a value*, the sheriff must * answer for goods to that value, and the plaintiff may have a venditioni exponas, and if he will not sell them, then the way is to have a *distringas to the coroner*, and that is the right method to lay him by the heels, till he has sold. Per Holt Ch. J. Farr, 118. Mich. 1 Ann. B. R. Anon.

*[439] S. P. And the old sheriff has not only authority, but is bound and

3. And if the sheriff is out of his office after such return, then plaintiff may have a *distringas to the new sheriff to distrain the old one to sell*, * and shall return issues upon him if he does not. Per Holt Ch. J. 11 Mod. 36. Clerk v. Withers.—Cites 34 H. 6. 36.

compellable to proceed in the execution; for the same person that begins an execution shall end it. 1 Salk. 323. pl. 10. S. C.—S. C. 6 Mod. 295. And by Holt Ch. J. The sheriff out of office may sell without a venditioni exponas: otherwise why should a distringas go to the new sheriff to command the old one to sell. There are 2 sorts of distringas's nuper vicecomitem, according to 34 H. 6. Rast. 164. Thesaurus Brevium, 90. the one to command the old sheriff to sell and bring the money into Court, and the other to command him to sell and deliver the money to the new sheriff. Now this distringas does not give him an authority to sell, but is compulsive upon him; and if he does not sell he forfeits issues toties quoties.

4. A venditioni exponas is no award of the Court. 11 Mod. 35. Mich. 3 Ann. B. R. in case of Clerk v. Withers.

See Error (H.b) (I.b)

(K) Sale. Restitution. In what Cases after Sale there shall be Restitution.

1. **N**O remedy lies against the sheriff for the sale under value unless it be by *covin*. Kelw. 64. b. pl. 2. Trin. 20 H. 7.

2. If the sheriff sells a term on a fieri facias, and afterwards the judgment is reversed, yet the party shall not be restored to the term, but to the money, if the sale be without fraud. Per tot. Cur. Mo. 573. pl. 788. Mich. 41 & 42 Eliz. Anon.

3. Sale

3. *Sale of a term upon an execution by a sheriff for 100l. to a stranger, though it was worth 1000l. yet upon reversal he shall not have the term again, but the 100l. only.* Yelv. 180. Trin. 8 Jac. B. R. *Goodyer v. Junce.*

Cro. J. 246.
S. C. —
S. C. cited
Arg. 2 Ventr.
314, 315.
pl. 302. in

the case of *Peyton v. Ayliffe*

4. Bill was brought to vacate a judgment, whereupon a lease was extended and sold by the sheriff to one Parker, in trust for the defendant, the confessee of the judgment, and to have the bill of sale set aside, and an account for the profits since the sale and writ of restitution of the possession, the lease being alleged to be of far greater value than extended at. The defendant demurred; for that it was inconsistent with the rules of equity, after a judgment executed by seizure of a chattel lease duly appraised and sold by the sheriff, to dispossess a real purchaser of what he has purchased for valuable considerations, upon a bare pretence, that it is of greater value than it was appraised for, and sold at, by the sheriff, who is no party, nor any offer by the bill to reimburse the purchaser what he is really out; also the defendant by answer denies tampering with the sheriff to have the lease sold at an under value. Whereupon it was ordered, that the plaintiff reply to the answer, notwithstanding the demurrer, and proceed to the examination of witnesses, and hearing the cause, but no costs to be allowed. And upon the hearing before the Lord Keeper Bridgman, the 5th of February 1671, a decree was made to account and reconvey. 3 Chan. Rep. 57, 58. 22 Car. 2. *Gascoigne v. Stut.*

Nels. C. R.
143. S. C.

(L) Chargeable in Debt.

[440]

1. **I**N debt upon a recovery of damages the defendant pleaded, that a *fieri facias* issued to levy the damages, and thereupon he paid the money to the sheriff, who was discharged of his office before the return of the writ; but that the new sheriff returned, that he received such writ endorsed *fieri feci de bonis, &c.* the sum demanded, but the money was not brought into Court. Upon demurrer it was adjudged, that the plaintiff be barred; for the defendant having once paid the money, there is no reason he should pay it again; and the plaintiff is to take his remedy against the old sheriff, if he will. Cro. E. 208, 209. pl. 4. Mich. 32 & 33 Eliz. B. R. *Rook v. Wilmot.*

S. C. Savil
128 pl. 192.
by name of
Rookers v.
Wilmor, ac-
cordingly;
and says,
that with
this opinion
agrees 13 H.
4. 58. 21
H. 6. 5. &
44 E. 3. 18.
Rokes v.
Wilmore.

And. 247. pl. 260. S. C. accordingly.

2. If sheriff, upon *fieri facias*, returns, *fieri feci*, and that he has received the money, debt lies; because he has made himself debtor of record, and the law makes contract and privity between him and the recoveror. Palm. 148. Mich. 18 Jac. B. R. Anon. says, it was so adjudged in Bank in *Spike's* case.

Palm. 124.
S. P. in the
same words

3. If upon a *ca. fa.* the sheriff returns, *denarios hic habet paratos,*

Palm. 124.
S. P. in the
same words

debt lies. Per Haughton J. Palm. 148. says, It had been so adjudged in this Court.

S. P. Palm.
448. Mich.
18 Jac. B. R.
Anon.

seems to be
S. C. and
says, The
doubt was,
If he shall
have debt
against the
sheriff?

And by the
opinion of
the justices
he shall not,
but shall
have other
action.—

Palm. 124.
S. P. in the
same words

4. Upon an execution on *elegit*, the sheriff returned, that he had by a jury appraised such goods in specie to the value of 40*l.* and had extended such lands, both which he had delivered to the plaintiff, *ubi revera* he had not. The plaintiff thereupon brought debt against the sheriff, and had judgment; and upon error brought, a judgment in C. B. 14 Jac. in PIKE's case, was cited; where the sheriff, upon *sci. fa.* returned, that he had sold the goods for so much money, which he had delivered to the plaintiff; and the plaintiff thereupon averring, that he had not the money, maintained an action of debt. But per Curiam, This differs from the case in question; because there the sheriff confessed, that he had sold the goods and delivered the plaintiff the money; but here it is not returned, that he meddled with the goods, or with the value thereof: so as there is not any certainty to charge him. And so reversed the judgment. C. J. J. 566. pl. 1. Pasch. 18 Jac. B. R. Coriton v. Thomas.

Jo. 430. pl.
2. Perkin-
son v. Gili-
ford, S. C.
accord-
ingly.—
Cro. C. 539.
pl. 3. S. C.
adjudged

5. If the sheriff sells goods levied by a *fieri facias*, and does not pay the money, but dies before the return of the writ, an action of debt lies; because the defendant is discharged, and may plead, that his goods were taken in execution by the sheriff, in satisfaction of the same debt. Mar. 13. pl. 33. Pasch. 15 Car. Parkinson v. Colliford.

accordingly by Berkeley, Jones, and Crooke (Bramston being absent.)—S. P. Hob. 206. in the case of Speake v. Richards; and held, That debt lay; but this was after a return of *denarius paratos habeo*.—Brownl. 51. S. P. in S. C.—Hutt. 11, 12. S. C. and the Court inclined, That in this case debt lies; for it is a general contract.—Mo. 886. pl. 1224. S. C. adjudged for the plaintiff.—Noy 22. Sark v. Richards, S. C. accordingly.—2 Show. 281. pl. 271. Hill. 34 & 35 Car. 2. B. R. * Speake v. Richards, That an action was held to lie against the under sheriff for money levied on a *fieri facias*, as money received for the plaintiff's use, and that before the writ returned; and so ruled in this case, as likewise in the case of Verdon of Norfolk.

* This, though printed as an original case in 2 Show. 281. seems only to be the same case of Mar. & Jo. & Cro. C. mentioned above,

+ If the sheriff levies money on a *fieri facias*, an action of debt lies against him for it before the return of the writ; for otherwise he would take advantage of his own wrong. 2 Show. 79. pl. 63. [441] Trin. 31 Car. 2. B. R. Cockram v. Welbye.—Mod. 245. pl. 5. Pasch. 29 Car. 2. C. B. S. C. but S. P. does not appear.—2 Mod. 212. Pasch. 28 Car. 2. C. B. S. C. but S. P. does not appear.

If after such
return the
goods are
lost or res-
cued, he
must make

6. If a sheriff returns goods levied to such a value, the sheriff must answer for goods to that value; and sure debt will lie against him after such a return, and a venditioni exponas. Per Holt Ch. J. Farr. 118. Mich. 1. Ann. B. R. Anon.

them good to the value returned, and debt lies against him. 11 Mod. 36. in the case of Clerk v. Withers.—Cites 2 Sand. 343. That before sale the defendant is actually discharged; for the goods are taken in lieu of the debt, and the plaintiff has no remedy but against the sheriff.

(M) Actions against him. False Return.

See Return,
(Q)

1. **T**HE writ was delivered to the under sheriff by the plaintiff, his creditor being then and there present, and in the sight and company of the high sheriff, and yet he, and not the under sheriff, returned, *non est inventus*; and thereupon the action was brought against him, and adjudged good; for he is the proper officer to the Court, and not the under sheriff; and every neglect or fraud of the under sheriff, in executing the office, is punishable against the high sheriff by fine, &c. but he is not to be committed for the act of his under sheriff. 3 Nels. Abr. 237, 238. pl. 6. cites 1 Mod. 33. 57, 58. Franklyn v. Andrews.

This case is cited at Mod. 33. & Mod. 58. as cited by Mr. Nelson; and it is likewise cited Mod. 244. & 2 Mod. 85. in the case of Page v. Tulse; but

in neither place is it cited to the purpose here mentioned, as to the distinguishing between the sheriff and under sheriff.

2. Upon writ to the sheriff he first made warrant to the bailiff of the liberty, and after to his own bailiff, who arrested the party, and suffered him to escape; and then the sheriff returned, *mandavi ballivo*; upon affidavit of the fact, the sheriff was ordered to attend: and it was agreed, that action lay against the sheriff for false return, as *non est invent.* &c. and his amercements were estreated. 12 Mod. 311. Mich. 11 W. 3. B. R. Steward v. Floyd.

3. If the sheriff will return, *liberavi parti*, where he refuses to accept, action will lie against him for a false return. Per Holt. 12 Mod. 361. Pasch. 12 W. 3. B. R. in the case of Pullen v. Purbeck.

4. The writ of *capias in Withernam* is no writ of execution; and we can have no action of false return against the sheriff; 1st, Because the *elongat.* is grounded upon an inquisition. 2dly, If he cannot replevy the party, he can make no other return; for he is not to take upon him to falsify the suggestion of the writ. 12 Mod. 424. Mich. 12 W. 3. B. R. in the case of More v. Watts.

No action of false return will lie against the sheriff for returning an *elongat.* in any case where he

cannot have sight of the thing to be replevied, because he can make no other return; but if such an action could, the taking an inquisition would not have prevented it; for it is not a sheriff's taking an inquisition, where it does not lie, will protect him from an action. Per Holt Ch. J. 12 Mod. 426. in the case of More v. Wats. ——— 2 Salk. 581. S. C.

(N) Chargeable for Nonfeasance.

[442]

1. **H**E to whom a remainder was made by fine, sued *habere facias seisinam* to the sheriff, and the sheriff returns, that he cannot make execution for *resistance*; and it is adjudged, that his return is not good; and the sheriff was amerced at 20 marks. Co. R. on Fines, 12.

2. In attain, &c. the *distringas* was returnable on the first day of Easter Term in C. B. but because the jury was not full, the sheriff

sheriff kept back the writ and return till the Monday following; on which day the writ and pannel were returned, and the jurors appeared, and both parties prayed the Court to take the jury, but they would not, but delivered back the writ to the sheriff, and amerced him 20l. and discharged the jury. D. 198. b. pl. 52. Pasch. 3 Eliz. Anon.

3. Action will lie against a sheriff for *not returning good issues upon a distringas*. Per Holt Ch. J. 12 Mod. 494. Pasch. 13 W. 3. B. R. Anon.

(O) Punished, for what Returns.

1. **W**HERE a bailiff of fee, or franchise, returns a pannel to the sheriff, and he puts in other names, and returns a pannel of himself, this shall not be ousted at the prayer of the bailiff, but they shall be put to their action against the sheriff, quod nota; for the Court is seised of a perfect record. Br. Pannel, pl. 6. cites 30 Ass. 5.

2. Debt against 2; at the capias the sheriff returned, *cepi corpus*; and at the day the one came, and the other not; and he who came, said, that the other is dead; and because the plaintiff could not deny it, the writ was abated notwithstanding the return of the sheriff; quære, if the sheriff should not be amerced. Br. Briefs, pl. 90. cites 50 E. 3. 7.

3. Where the sheriff returned *cepi*, &c. and had him not, by which *habeas corpus* issued, and he returned *cepi*, &c. and had him not, he was amerced, and the plaintiff prayed writ against the sheriff to answer to the disceit, and could not have it, but was drove to the Chancery by original, or to sue against the sheriff in the Exchequer upon his account. Br. Process, pl. 31. cites 7 H. 4. 31.

4. Forasmuch as Thomas Herbert sheriff of Monmouthshire hath returned *non est inventus*, upon an attachment awarded against Roger Williams, who is a justice of peace, and as is informed, was at the last quarter-sessions holden for the same county; therefore the sheriff is amerced 5l. Cary's Rep. 62. cites 2 Eliz. fol. 84. Sir Thomas Stradling v. Earl of Pembroke.

So likewise if the party appears at any time before the amercement is created, the Court will discharge the amercements upon payment of costs.

5. If upon a *latitat* taken out of B. R. the sheriff doth return a *cepi corpus*, and the party arrested upon this process doth not appear at the day of the return, the sheriff may be amerced by the Court; yet if the sheriff be amerced, and the party arrested do appear within a week after the day on which he ought to have appeared, the amercement may by the course of the Court be taken off the sheriff (Hill. 22 Car. 1. B. R.) For a week's time is but a small matter, and the party cannot be prejudiced by this small delay, *et de minimis non curat lex*. L. P. R. tit. Amercements.

L. P. R. tit. Amercements.

6. Upon

6. Upon arrest the sheriff took bail according to the statute of 23 H. 6. cap. 10. and at the day of the return the defendant did not come, but the sheriff returned cepi corpus; and thereupon the plaintiff brought an action for a false return, but adjudged a good return, because he is compellable by the statute to take bail, and the statute has made no alteration of the return. 2 Sid. 28. Mich. 1657. B. R. Williams v. Tempest & al.'

7. Twisden said, he had known the sheriff amerced for a special return since the statute of 23 H. 6. which alters not the return, but orders security to be taken by the sheriff; and because the plaintiff, bailiff of Westminster, had returned a bill of Middlesex with a supersedeas out of the Chancery, because it was with an ac etiam, the Court conceived the return void, and gave only 4 days to return him his writ in pain of 100l. and would not suffer him to take defendant by a new writ. 2 Keb. 113. pl. 52. Mich. 18 Car. 2. in the case of Benson v. Dowty.

(P) What Act of Office done by him in his own Case is good. See (Q)—
See, Him-
self.

1. IT is used in Chancery if the sheriff brings writ that he shall have writ original to the coroners upon his suggestion. Per Hull J. Br. Process, pl. 40. cites 12 H. 4. 24.

2. In detinue the scire facias upon garnishment was against J. R. and the writ was returned served by J. R. sheriff, and the plaintiff said, that this J. R. who is warned, and he who is returned is one and the same person, and so he served the writ against himself; and the best opinion was, that he cannot warn himself, and so not served; but Brooke says, quære how it appears that they are one and the same person, and it seems that such averment cannot be taken upon the return of the sheriff. Br. Process, pl. 60. cites 8 H. 6. 28.

But per
Cott. J.
where par-
ties are at
issue, and
venire fa-
cias re-
turned, and
the plaintiff
is after-
wards made
sheriff, he
may serve

the habeas corpus for himself; for he does not make the pannel, and it is lawful to make them appear, quod nota. Br. Process, pl. 60. cites 8 H. 6. 28.

3. If the sheriff sues action he may well serve the process against the defendant, and he may find pledges de prosequendo, in Chancery, or in C. B. where the writ is pending; but if the sheriff be defendant, he cannot serve the process against himself, note the diversity. Br. Process, pl. 9. cites 9 H. 6. 10. Per Cur.

Br. Process,
pl. 145.
cites 14 H.
6. 1, 2.—
But Cott.
said, there is
no diversity

when the sheriff is plaintiff, and when defendant; for he cannot serve the process upon himself, nor for himself, but he may serve the process against the jury after that the pannel is returned by another sheriff. Br. Process, pl. 60. cites 8 H. 6. 28.

The sheriff himself may be plaintiff in writ of debt, and the under sheriff may take pledges, and return the writ well enough, and when it comes to the venire facias the defendant may shew this, and have process to the coroners, and if the sheriff himself returns it, the pannel is quashable. Br. Office & Off. pl. 17. cites 14 H. 6. 1, 2.—Br. Process, pl. 145. cites S. C.

Where the sheriff is plaintiff, yet all the process shall go to him, and he may well serve it as summons, capias, &c. except the pannel of array which he shall not make, and this where he is not named sheriff in the writ, and where he is named sheriff in the writ, there process shall issue to the coroners: note the diversity. Br. Process, pl. 14. cites 34 H. 6. 29.

* S. P. Per Hank. Br. Process, pl. 40. cites 12 H. 4. 24.

4. A common recovery suffered by him of lands in the county, of which he is sheriff, is erroneous, and a release of errors by him is no discharge against the issue in tail, or remainder-man. D. 188. pl. 8. Mich. 2 & 3 Eliz. Sir Ralph Rowlett's case.

So in replevin it appeared that execution was

* 5. If sheriff has a statute extended, and a liberate is directed to him, it is void. D. 188. Marg. pl. 8. says it was so resolved 37 Eliz. Cavendish's case.

sued upon a statute in Chancery, and the liberate executed, by the conusor himself, who was then sheriff, and was therefore adjudged erroneous; for there was no proper name of any sheriff indorsed; but generally (Vic.) Mo. 547. pl. 781. Trin. 40 Eliz. Ellison v. Bret.

Jo. 352. pl. 5. Mich. 10 Car. B. R. S. C. but S. P. does not appear. But Ibid. 373. pl. 11. Mich. 11 Car. B. R. S. C. and S. P. held accordingly.

6. The sheriff was one of the conusors of a fine, and therefore the writ of covenant was directed to the coroners, upon a suggestion with a clause of the reason inserted in the writ, and it was insisted to reverse the fine, and the rather because he was not the sole conusor, but others were joined with him; but resolved per tot. Cur. that it was not error; for if the writ be directed to the sheriff, and he is a party, it is doubted in the books if the sheriff as plaintiff may execute a writ for himself, or as defendant upon himself. And the fine was affirmed. Cro. C. 415, 416. pl. 3. Mich. 11 Car. B. R. Done v. Smethier & Leigh.

(Q) Compellable to do what, though himself is Party.

1. **W**HERE the sheriff distrains, yet replevin shall issue to the sheriff, quod replegiare faciat to the plaintiff averia, quod J. N. cepit by a strange name, and by this the sheriff himself shall make replevin, or otherwise, process of contempt shall issue. Br. Replevin, pl. 65. cites the register.

And. 10. pl. 21. MORGAN v. MICHEL AND WYKES, S. C. reports that the return was thus, viz. Et quoad summon. prædict. T. W. justiciariis

2. A. and B. were sheriffs of the city of Gloucester; A. was impleaded with two others in a writ of entry. Upon the original writ A. and B. both returned that they had summoned the 2 other defendants, but as to A. they returned, that he was the same person that was sued, and therefore he could not summon himself; after issue joined, and a verdict for the demandant, this matter was moved in arrest of judgment. And Hill. 18 H. 8. fol. 5. was cited where Fitzh. was of opinion that the sheriff should be amerced for such return, inasmuch as he might summon himself. Quære. D. 266. pl. 8. Mich. 9 and 10 Eliz. Anon.

infra scriptis certifico quod idem T. W. & ego T. jam unus vicecomitum civitatis prædictæ sum unus & idem & non alius neque diversus; ideo ego præfatus T. & H. alter vic. civitatis prædictæ meipsum secundum exigentiam illius brevis summonere non possumus. And says that this return was adjudged to be a good return.——Bendl. 146. pl. 204. S. C. and sets forth the return accordingly, and that it was adjudged good, and that the author of that book, was of counsel with the tenants aforesaid.

(R) Punished for what, and how in civil Cases.

1. **I**N assise a bailiff who had returned villeins was amerced, and non omittas awarded; quod nota bene. Br. Amercement, pl. 39. cites 2 Ass. 28.

2. Trespass

2. Trespass lies if the sheriff *seises* and takes the goods of a man appealed of felony before that he be attainted. Br. Trespas, pl. 373. cites 44 Aff. 13.

3. Giving money to sheriff to arrest a man is against the law, [445] and his taking is *extortion*; the Court may allow fees, but sheriff cannot take them without such *allowance*; per Coke, cites stat. W. 1. And a promise of money on such consideration is illegal, and an action is not maintainable upon it; quod fuit concessum per Curiam, and judgment accordingly against the plaintiff. Roll. Rep. 313. pl. 24. Hill. 13 Jac. B. R. Sherley v. Packer.

4. The sheriff having seised goods upon a *venditioni exponas*, he returned *non inveni emptores*, and then his office determined, and he detained the goods in his hands; the plaintiff in the action prayed an attachment. Per Doderidge and Jones J. (the Ch. J. and Whitlock J. absent) though we may grant one yet it is not our office, but you may have *petit issues* returned upon him, and it is all your remedy. Lat. 117. Pasch. 2 Car. Dixon's case, cites 9 E. 4. 50.

5. Sheriff shall be *fined and amerced* for every default in the execution of his office, though it be by neglect or fraud of the under sheriff. But per Jones, he shall not be imprisoned for the act of the under sheriff, nor indicted. Lat. 187. Hill. 2 Car. in Laicock's case.

But for other matters of damage, sheriff shall answer, and not the under sheriff.

Lat. 187. Hill. 2 Car. in Laicock's case.

6. Sheriff was laid by the heels for keeping goods in his custody, and not selling them when he had opportunity. Arg. cited as the case of Hardy the sheriff of Chester. 2 Show. 87. in case of King v. Bird.

7. If a motion be against sheriff to return a writ, we never grant a penalty upon the first motion. Cumb. 25. 2 Jac. 2. B. R. Anon.

8. If a sheriff constantly or frequently used to let persons at large without bail, it is an abuse of his office, and the Court then will interpose. Per Holt Ch. J. 2 Salk. 467. pl. 5. Mich. 11 W. 3. B. R. Anon.

9. A sheriff is *fineable* for leaving errors in outlawries. Per Cur. 12 Mod. 546. Trin. 13 W. 3. B. R. Wilbraham v. Doley.

10. Sheriff was fined and committed for delivering an infant's writ of appeal to him; per omnes Justiciarios præter Turton. 1 Salk. 177. Pasch. 12 W. 3. B. R. Toler's case.

(S) *Indictable* or punishable. In what Cases relating to Offenders, &c.

1. **W**RAY was convicted of a misdemeanor for attempting to counterfeit chequer bills, and after judgment, that he should stand in the pillory, the sheriff out of favour delayed the execution 1 Salk. 272. The King v. Fell, S. C. but not exactly

S. P. and though it mentions only the escape of one Berkenhead,

yet he and Rayes, or Wray, were committed for the same offence, as appears 5 Mod. 414. S. C. but S. P. does not appear there neither, that the sheriff is answerable for the escape.

cution beyond the usual time, and in that time Wray escaped. Per Holt, in this case the sheriff ought to be prosecuted and fined grievously; for the judgment ought to be executed in convenient time, and the sheriff's respiting is an affront to the justice of the nation. 12 Mod. 227. Mich. 10 W. 3. The King v. Fell.

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2. On an indictment the case was, a justice of peace had *power to commit to ward*, which is the word in the statute. The justice committed one to the gaoler of the county. And per Cur. the sheriff, and consequently his gaoler, is the proper officer; and if he let him go at large, it is such an offence as is proper for an indictment. 11 Mod. 79. pl. 15. Pasch. 5 Ann. B. R. The Queen v. Belwood.

(T) *Securities, &c. given to him. In what Cases they are void.*

1. **D**EBT upon bond, taken by the sheriff of the defendant his clerk, conditioned to pay the money, which he should receive for the queen, into the Exchequer, within 14 days after he had received it; the defendant pleaded the statute 23 H. 6. cap. 10. and averred, that the bond was taken colore officii. But upon a demurrer, it was adjudged for the plaintiff, because that statute does not intend any bonds taken of such as are not to appear, nor are in ward. Mo. 542. pl. 717. Trin. 29 Eliz. Cartwright v. Dalesworth.

Lat. 23. Elwoly v. Reynel, S. C. but that is mentioned to be Trin. 2 Car. and in the argument there it is said that the jury found expressly that the bond was not given for ease and favour — Poph. 165. Sir George Reynold's case, Pasch. 2 Car. B. R. And Doderidge said, it is not to be under-

2. The marshal of the King's Bench had the defendant in execution, and upon a habeas corpus suffered him to go into the country, and took a bond of him to be a true prisoner, and had a keeper with him as far as Charing Cross, and there he went from his keeper. This was adjudged an escape against the marshal, upon which he brought debt against him upon his bond; the defendant pleaded the statute 23 H. 6. and that the bond was made for ease and favour, &c. upon which they were at issue, and the plaintiff had a verdict; it was argued, that a bond made for ease and favour to the marshal is void, notwithstanding it be coloured with the pretence of being a true prisoner, but that it is lawful to take bond of one in prison to be a true prisoner to the marshal. But if a sheriff has one in execution for a stranger, and the prisoner is likewise indebted to the sheriff himself, and he takes a bond from the prisoner to pay the debt due to him, and also that he shall be a true prisoner; this is for ease and favour, and the illegal thing makes the whole void. But a bond to the sheriff without constraint, and to a good purpose shall not be void, though it pursues not the statute, and Doderidge and Jermin agreed the difference. Lat. 143. Hill. 20 Jac. Sir G. Reynell v. Elworthy.

stood by this statute that a sheriff, gaoler, or marshal, shall take no bond; for if the marshal has a man in execution, and fear that he will escape, and he takes bond of him, this bond is good.

And

And per Jones, the intent of the statute is, that the sheriff or marshal shall not suffer prisoners to go at large; for that is within the statute; and it was ruled in B. R. that the Marshalls should be enlarged, and this shall be called within the rule; and if the marshal take a bond to tarry there, it is good, but if he suffer him to go at large, it is not good.

3. One Thody being *indicted for killing a man*, the *sheriffs of London seise his goods before conviction*, and *Prettiman covenants with them, if they would leave the goods in his house*, that if Thody was found guilty, *he would deliver them the goods, or otherwise pay them 300l.* It was objected, that this covenant was void, because it was taken by the sheriff *colore officii*, in a case where he had no such power: for he ought only to take an inventory of the goods. And obligations or covenants, in such cases, are void at common law, as well as by the statute 23 H. 6. Plow. 67. 10 Co. BEWFAGE'S CASE; Hob. NORTON and SYMS, as bonds *pro favore seu easiamento*, and bonds upon bailing one that is not bailable; as was resolved in SIR J. NORFOLK'S CASE, 19 Car. 2. And the sheriff at common law ought not to seise the goods of a person indicted for felony, but he might inventory them; but the party's wife and children was to be maintained out of them; and that so is the statute of 1 R. 3. 3. 3. Inst. 228. Sawyer for the plaintiff said, that at common law the sheriff might seise them after indictment, and put them into the hands of the neighbourhood, and so is 7 H. 4. 47. and the statute of R. 3. is intended only when a man is arrested for suspicion of felony, his goods shall not be seised; and so it is expounded by 3 H. 7. And he said this statute of 1 R. 3. is a private law, and ought to be pleaded, and 23 H. 6. is adjudged so. Sed Cur. e contra. Per Cur. semble, that *after indictment the sheriff may inventory, but not remove the goods of the party*; and if any one will secure them, that they shall be forth-coming, it is lawful for the sheriff to take such security. Sed adjournatur. Freem. Rep. 326, 327. pl. 406. Mich. 1674. in Scacc. The Sheriffs of London v. Prettiman. [447]

4. Where a sheriff *takes a bond as a reward for doing a thing*, it is void; for it may be to warrant him in the breach of his duty; but if it is *to save him harmless in doing a thing which it is his duty to do*, then it is good. 3 Salk. 75. pl. 11. Mich. 9 W. 3. Plackett v. Gresham.

5. In debt upon bond made to the plaintiff, by name of the high bailiff of Westminster, by Whiteman, conditioned, that *whereas upon a fi. fa. he had levied goods as the goods of one Cunningham, which W. claimed as his own*, and thereupon the said officer delivered the goods to W. *if therefore the said W. should re-deliver them to the plaintiff, if upon a trial, they should be found to be the goods of C. and if the defendant should indemnify the plaintiff, for delivering the goods to W. and for returning nulla bona*, then the bond to be void; the defendant pleaded non damnificatus; the plaintiff replied, and set forth the proceedings, and judgment against C. Upon demurrer to the replication it was objected, that this bond was against law, it being to indemnify an officer for making a false return; but it was answered, that the bond was lawful. And by the opinion of the Court, judgment

ment was pronounced for the plaintiff. But afterwards leave was given to argue the case again, and so it was, but the Court adhered to their former opinion. But upon defendant's offer to pay what the plaintiff was damnified, execution was stayed, and referred to the prothonotary to compute, &c. Lutw. 593. 596. Mich. 10 W. 3. C. B. Knipe v. Hobert.

(U) Securities given to Sheriff, *Pleadings thereon.*

So where in such case the defendant plead, that he has saved him harmless, to this the plaintiff demurs, and held a good demurrer; for

he ought to have pleaded *non damnificatus*, and not generally that he has saved him harmless, for that he may do in many things, and yet the plaintiff may be damnified in some other things, wherein he was also bound to save him harmless. The rule was to shew the cause why judgment should not be given for the plaintiff. Sty. 16, Pasch. 23 Car. Wroath v. Elseye.

*[448] Comb. 245. S. C. says, the plaintiff replied, that it was for the better securing money due to himself, and traversed the case, &c. and defendant demurred; per Cur. it is an ill inducement, but

that is no substantial part of the plea, but only matter of form; and if we cast away the inducement the traverse is well; but here you confound the cause of action in this inducement, but you should have said that it was *pro bono & vero debito*, and then traversed the case and favour.

1. **B.** BROUGHT an action of debt upon a *bond* given unto him as sheriff *to serve him harmless*, the defendant pleaded a special plea, which amounted to no more than that he had saved him harmless; to this plea exception was taken, because he did not shew how he had saved him harmless: to this it was answered, if it be that he has from time to time saved him harmless, it is well enough. But by Roll Ch. J. it is not so here, and therefore let the plaintiff have judgment, nisi. Sty. 353. Mich. 1652. Bond v. Martin.

2. Sheriff brought debt on *bond conditioned for payment of 120l.* without saying more. The defendant pleads, that it was *for ease and favour*: plaintiff replies, that it was that defendant should remain a true prisoner, and traverses the ease, &c. Defendant demurs, and judgment * was given for defendant; because plaintiff, of his own shewing, had made the bond void at common law; it appearing upon oyer of the condition, that it was made for the payment of a certain sum of money; and yet in the inducement to the traverse in his replication he alleged, that it was made for the sheriff's security, that R. the prisoner should not escape. Now this is an *averment against the condition of the bond to which an obligee shall never be admitted*; besides it is not lawful for the plaintiff to take an absolute bond, with a condition to pay money under pretence of security against escapes, without mentioning it. Carth. 300, 301. Pasch. 6 W. 3. B. R. Foden v. Haines.

(W) *Attachments* against him, in what Cases, and to whom directed.

Br. Replevin, pl. 9. cites S. C.

1. **T**HE *sheriff upon replevin did nothing at the alias, or at the pluries*, and process issued to the coroners to attach the sheriff, and to make replevin, quod nota; and the coroners returned, that they had *attached the sheriff, and he did not come, by which*

which issued distress, quod nota; process of the contempt. Br. Contempt, 1. cites 43 E. 3. 26.

2. Judgment was given against one in B. R. *capias* issued to the late sheriff to take, &c. the party paid the fee for the execution, and the sheriff received the writ of the plaintiff, and he shewed the defendant to the sheriff, and he viewed him, but he turned about and said, *I cannot see him*, and after returned a *non est inventus*; the party made an affidavit of this matter, and prayed an attachment against the late sheriff. Jones J. said, he is now no officer; to which it was said, that this was a contempt during his office; and Doderidge and Jones J. granted an attachment. Lat. 176. Hill. 2 Car. Anon.

3. If sheriff of a county in a city be in contempt, the attachment is to go to the coroner, and not to the mayor or chief officer of the corporation in such city or town. And if the offender be out of his office, the attachment shall be directed to the new sheriff. 2 Vent. 216. Mich. 2 W. & M. C. B. Anon.

4. An under sheriff returned a *fieri feci*, and a *venditioni exponas* was sued out; after two or three rules upon the sheriff to make a return, and failure therein, an attachment was granted against him, the Court declaring they never would grant it against the high sheriff for not returning the writ. And such a rule was made the same term in the like case against the under sheriff of York. 12 Mod. 454. Pasch. 13 W. 3. B. R. Kilderton v. Wilkenfon.

5. The sheriff made a return of a *cepi corpus*, but would not bring in the body: upon which the plaintiff had obtained several rules upon the sheriff to bring in the body; but the sheriff still stood out in contempt, and therefore the plaintiff prayed now an attachment against him. But the Court upon hearing the rules read, said, there was not one peremptory rule, and therefore the motion for an attachment was irregular at present. However, upon counsel's desiring then a peremptory rule, the Court granted it. And in another case they said, that amercements only used to be the method of enforcing these rules, but lately they have granted attachments. 1 Barnard. Rep. in B. R. 246. Mich. 3 Geo. 2. 1729. Smith v. Norton.

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(X) Actions against him. Trespass, or Case, or Debt.

1. **D**EBT; at the distress the sheriff distrains J. B. where the name of the defendant in the writ is T. B. there J. B. shall have his remedy against the sheriff; and it seems by general action of trespass. Br. Trespass, pl. 135. cites 19 H. 6. 80.

2. But where he serves the writ truly, and imbezils it, or makes a false return, it seems that action upon the case lies. But contrary of actual tort, ut supra. Br. Trespass, pl. 135. cites 19 H. 6. 80.

3. Debt does not lie against a sheriff upon an *escape upon mesne process*, but an action on the case only. 1 Vent. 7. Hill. 20 & 21 Car. 2. B. R. Anon.

(Y) Actions by him, in respect of his Office.

1. THE sheriff levied goods by a fieri facias, and before execution done by sale, the defendant took them again; the sheriff brought trespass. The question was, whether it lay for the sheriff, because he had no property in the goods. Fenner only being in Court said, he had conferred with Anderson Ch. J. and Periam, who held clearly that the action did lie. Cro. E. 639. pl. 39. Mich. 40 & 41 Eliz. B. R. Tyrrel v. Bath.

Lev. 282.
S. C. and
says, that it
being ob-
jected, that
the sheriff
in such case
might
maintain
trespass, but

2. So the sheriff seized goods by virtue of a fieri facias, and the defendant, whose goods they were, took them away. The sheriff brought an action of trover, and adjudged that this action would lie: because by the seizure, the property of the defendant ceased: and Kelyng, Rainsford and Moreton, hæsitante Twisden, gave judgment for the plaintiff. Vent. 52 & 53. Hill. 21 & 22 Car. 2. B. R. Wilbraham v. Snow.

not trover, the whole Court held e contra, and that the sheriff had property sufficient to maintain this action, and judgment accordingly; and Keeling Ch. J. said, that the property is altered from the owner, and given to the party, at whose suit; the Reporter adds, quære de ceo. — Sid. 438. pl. 3. S. C. adjudged accordingly, and said, that the sheriff has such property, that if he loses the goods he shall answer for them. — 2 Saund. 47 S. C. adjudged accordingly, nisi, &c. and says, it was not moved afterwards. — Mod. 30. pl. 75. S. C. but not adjudged.

[450] (Z) Pleadings by him, and Bailiff.

1. TRESPASS of goods taken, the defendant said that he is sheriff of C. and that exigent of felony issued against the plaintiff, by which he took the goods. It was objected that he had not counted of them; but per Keble, that it is no matter to you but to the king, and he shall account to the king after. Br. Trespas, pl. 267. cites 3 H. 7. 3.

Hob. 206.
pl. 200. S. C.
accord-
ingly. —
Hutton, 11,
22. S. C.
accord-
ingly. —
Noy 22.
S. C. by the
name of
Spark v.
Richards,
S. C. ac-
cordingly.
— Brownl.

2. A levari facias issued upon a recognizance in Chancery for 2000l. the sheriff returned that he had levied 500l. towards satisfaction of the plaintiff's debt, and that he had denarios paratos, &c. but because he did not pay it in, the plaintiff brought action of debt against him. The defendant, as to 300l. part, pleaded nil debet, and as to 200l. that before the return of the writ, he paid it to the plaintiff upon request, and shewed his acquittance. The plaintiff demurred; and after several arguments it was adjudged for the plaintiff for the 300l. and that as to the 200l. nil capiat per Breve, because the receipt thereof, and the acquittance, is confessed by the demurrer. Mo. 886. pl. 1244. Pasch. 15 Jac. Speake v. Richards.

51. S. C. says, note the plaintiff had concluded his demurrer ill; for he, demurring to the defendant's plea, which was grounded upon a release, should have demanded judgment, if the defendant should be admitted to plead a release made after the sheriff made his return.

3. A sheriff having *levied money* upon a fieri facias, the plaintiff brought *debt against him* for the money. He *pleaded the statute of limitations*; and the sole question was, whether this was an action that was within that statute? And resolved by North, Windham, and Atkins, (Scroggs contra) that that statute was no bar in this case, because this action is grounded partly upon matter of record; for the fieri facias issues out of this Court, and is returnable here. But in this case the *sheriff had made no return of his writ*; and therefore Scroggs said he was only chargeable by the receipt of the money, which was an action in pais; and for that reason he did conceive he should be within the benefit of this statute; but if he had made his return, then he had been chargeable by that, and then he should have been of opinion that the statute should be no bar. North, it is his fault that he makes not his return, and therefore he shall not take advantage of it. Judgment was given by the 3 judges pro quer. Freem. Rep. 236, 237. pl. 248. Mich. 1677. Cockram v. Welby.

4. A sheriff's *mandate to a bailiff of a liberty*, must be under the hand and seal of the sheriff, and so pleaded. Per Powell J. 2 Vent. 193. Car v. Donne.

5. *Trespass, &c. for taking and carrying away, &c. several goods*, the defendant *justified by virtue of an habere facias possessionem* upon a judgment in ejectment, &c. and that he as sheriff, and the other defendants in aid of him entered, &c. Et bona, &c. in executione brevis præd. extra domum amoverunt. Upon demurrer judgment was given for the plaintiff, because the plea was not a sufficient answer to the carrying away the goods; for the defendants *ought to shew in their plea to what place* the goods were carried, and *where they left them*. 2 Lutw. 1483. Trin. 11 W. 3. Rowley v. Hassard & al.

(A. a) Determination of Office. By what. [451]

1. **T**HE office of sheriff does not *determine by becoming a peer* on his father's death. Held by all the justices, and the Attorney and Solicitor General, but that he still remains a sheriff ad voluntatem reginæ. Cro. E. 12. pl. 3. 25 Eliz. C. B. Sir Lewis Mordant's case.

(B. a) Discharged by Writ, and of Acts done by him before Notice.

1. **A** WRIT of discharge of the old sheriff was *delivered to the county clerk sitting in the county court* in the absence of the sheriff. Per Dyer and Manwood J. his authority ceases. D. 355. pl. 36. Hill. 19 Eliz. Anon. But 37 & 38 Eliz. Per Anderson and Walmley J. the old
 sheriff is not discharged before the *new sheriff has accepted* the county of him. Ibid. Marg. —
 Noy 51. S. P. Per Anderson and Walmley. Burcher v. Wiseman.

2. The writ of discharge is not close, but patent, as a commission, and is directed *nuper vicecomiti*, reciting the words of the patent of the new sheriff, with a command to the old sheriff to *deliver the custody of the county, cum omnibus rotulis brevibus & aliis memorandis per indenturam* to the new sheriff. D. 355. pl. 36. Anon.

S. C. cited D. 355. Marg. pl. 36.—S. P. and seems to be S. C. it being by the same name, tho' in a different year, viz. Mich. 36 & 37 Eliz. B. R. Mo. 364. pl. 496.

3. *False imprisonment* was brought against St. John, who pleaded in bar that he at the time of the imprisonment was sheriff of Wiltshire, and that a *capias* was directed to him to take the plaintiff, by which he took and imprisoned him. The plaintiff replied that one Earnely was then sheriff, and traversed that St. John was sheriff; the defendant rejoined that he was sheriff for all the year before, and had no notice of the patent to Earnely, and that he had received no discharge for himself; and upon demurrer the defendant had judgment, because all acts which he hath done as sheriff, are good in law till he has received his discharge, or has perfect notice of the new sheriff. Mo. 186. pl. 338. Mich. 26 Eliz. B. R. St. John's case.

3 Rep. 72. Welby's case, S. C.—* And the shewing it to the old sheriff. And if in the mean time be-

4. The ancient sheriff is not discharged, nor the new sheriff charged, till 3 things are done, viz. The * patent to the new sheriff, the writ of discharge to the old sheriff, and the delivery of the prisoners by indenture to the new sheriff. Arg. and by all the Court (absente Gawdy) this delivery by indenture was by order of the common law. Cro. E. 366. Hill. 37 Eliz. B. R. Welby v. Skinner and Catcher.

tween the sealing the new patent, and the shewing it to him, he holds a county court, it is good. Cro. E. 12. pl. 2. Mich. 25 Eliz. C. B. Fitz's case.

The prisoners ought to be brought to the view of the new sheriff. 2 Lc. 54. Smalman v. Lane. — And ought to be delivered to him in the common gaol, and not elsewhere. Cro. E. 366.

*[452] 5. A writ of discharge was delivered to the sheriff, his under sheriff not knowing it makes execution in the country; and adjudged no execution, * and yet sheriff no trespassor. D. 355. Marg. pl. 36. cites Pasch. 44 Eliz. C. B. Fleming v. Cheverly.

after superedeas delivered to the sheriff, is void. Ibid.—But where A. recovered 100l. against B. and had a *fieri facias*, the sheriff levied 28l. and had not returned the writ nor paid the money to A. in action on the case by A. against the sheriff, defendant pleaded not guilty. Upon evidence it appeared that the writ was delivered to J. S. the under sheriff. 9 November, 34 Eliz. who executed it the same day. And the same day a writ of discharge was delivered to him, dated 6th November; but because he did not prove that he had notice of this writ of discharge before the execution served, the Court held clearly that he was yet sheriff, and chargeable to the plaintiff's action. Cro. E. 440. Mich. 37 & 38 Eliz. C. B. Boucher v. Wiseman.

(C. a) Two Sheriffs considered. How.

1. **I**N London and Middlesex both sheriffs make but one in both counties; and therefore it seems to be a good cause of challenge, if the writ appears to be returned by one sheriff only; and if one of them dies, the office is at an end till another is chosen.

chosen. The first *beginning of this custom* seems to be upon the foundation of the charter of K. John, who granted the sheriffwick of London and Middlesex, to the mayor and citizens of London, at the farm of 300l. per ann. So that being a grant in fee of the sheriffwick to them as a corporation, they had a right to name one or more officers, in order to execute the same; and they thought it proper to name two officers indifferently to execute both offices, and both of them to execute as one sheriff, though the *writ in Middlesex* is directed to them as one, viz. Vic.' com.' Middx. præcipimus tibi; in that of *London* vice comitibus London.' præcipim' vobis: and the reason of this difference seems to be, that before this grant of the sheriffwick to the corporation, the corporation nominated to the crown, and the crown appointed the sheriffs for London, and the London sheriffs were responsible to the king for the London profits of the sheriffwick; and that was the reason why two were appointed, that both might be responsible; and this nomination was, that the citizens might exhibit to the king responsible persons; and that seems to be the reason that in many of the corporations that are cities and counties, there are two sheriffs; but when by the charter of King John, the sheriffwick of London and Middlesex was granted to the citizens as a perpetual fee-farm, then they entered their sheriffs, which before were nominated for London only, and the election of the two was for both sheriffwicks, but the directions of the king's writs were as before, viz. In London to the two sheriffs, and in Middlesex, as if there was only one, G. Hist. of C. B. 136, 137. cites 3 Co. 72. 1 Show. 289. 162, 163. 2 Show. 262. 286. Lev. 284. Priv. of London, fo. 5, 6, 7. 272, 273. Hob. 70.

2. An information was brought against 3, whereof one of them was one of the sheriffs of the city of Chester, and the *venire facias* was awarded to the other sheriff. It was suggested on the roll, that one of the sheriffs is party. The question was, whether it was good? And it was adjudged to be well awarded. And as to an objection which had been made, that both are but one officer in law, it is plainly otherwise; for where there are 2 sheriffs, and one is challenged, the other shall supply that defect, and not the coroner; for he is not the person to execute the process of this Court, but only where the proper officer is wanting, which cannot be where there is one sheriff. 4 Mod. 65, 66. Mich. 3 W. & M. B. R. in case of the King and Queen v. Warrington, cites 22 H. 6. 51. b. pl. 17.

1 Salk. 152. pl. 2. S. C. accordingly; for the other may execute the writ, but he does it in the name of both. — Show. 327. S. C. accordingly. — Comb. 191. S. C. Pasch. 4 W. & M. B. R. Anon.

accordingly. — 12 Mod. 22. S. C. accordingly. — Carth. 214. Hill. 3 W. & M. S. C. accordingly, cites it as so held in the cases of Bethel v. Harvey, and of Rich v. Playex.

3. If one sheriff or coroner *die*, the Court can award no process to the other. Per Cur. 4 Mod. 65. Mich. 3 W. & M. B. R. The King and Queen v. Warrington. [453]

5. In *trespass* the *sheriff* returned the defendant *capias* & *lan-*
guidus in prisona, by which *distress* issued after the year against this
sheriff to the new *sheriff* to *distrain* the old *sheriff*, *ad habendum*
corpus, &c. and the *sheriff* returned issues 3s. *Philpot* said, the
 old *sheriff* is dead, &c. and here is * proof thereof. And per *Cur.*
 this ought to come in by return of the *sheriff*, and the *sheriff* has
 returned him *distrained*, by which *alias distringas* issued. *Br. Pro-*
cess, pl. 121 cites 22 E. 4. 1.

* All the
 editions are
 (process) but
 the word
 (proof) is
 more agree-
 able to the
 year-book.

6. There was an *habeas corpus* to *H.* the new *sheriff* of *B.* *ad*
recipend. &c. one *W.* who was in execution when one *B.* was *sheriff*,
 and left in gaol when *C.* succeeded to *B.* and never turned over
 by indenture to *C.* nor to *H.* the present *sheriff*, but was still in
 gaol, and charged with a new execution, which *H.* was ready to
 return, but prayed to be excused from returning the first exe-
 cution, because he was never in his custody upon it. The Court
 held, that as to the first execution, he still remained in the custody
 of *B.* though his body was actually in the custody of the new
sheriff; and that the difference between this and *WESTBY*'s case,
 is, that there the prisoner was turned over for one debt, but not
 for the other; and therefore it was an escape as to the debt for
 which he was turned over. And after it was agreed, that *B.*
 the old *sheriff* should turn him over to the present *sheriff* by in-
 denture, without taking notice of *C.* the intermediate *sheriff*;
 for he was never in his custody, and then he would make return
 of all the executions; quod nota. *Sid.* 335. pl. 21. *Pasch.* 19
Car. 2. *B. R.* *Hanmer v. Winmer.*

7. *J. S.* had judgment in debt against *C.* and had a writ of
 execution to *P.* the *sheriff*, but before it was executed, *C.* procured
 a *superfedeas* to *P.* who after his year was expired delivered over
 all writs to the new *sheriff* except this *superfedeas*; whereupon *J. S.*
 got a new writ of execution to the new *sheriff*, upon which the
 goods of *C.* being taken, he brought his action against *P.* for not
 delivering over this *superfedeas*; and after a verdict for the
 plaintiff it was moved in arrest of judgment, that this action
 would not lie, because a *superfedeas* is not a writ returnable,
 and is only a warrant to the *sheriff* for not obeying the writ of
 execution, he is not bound to deliver it over to the new *sheriff*.
 The prothonotaries said, the course was to take out a new writ
 to the new *sheriff*: but the Court inclined, that since he is bound
 to deliver over the *capias* for the plaintiff's benefit, he should
 likewise deliver over the *superfedeas* for the defendant's benefit;
 and that an action will lie against the old *sheriff* for not deliver-
 ing some writs, though they are not returnable, as a writ of
estrepement. *Mod.* 22. pl. 11. *Mich.* 28 *Car.* 2. *C. B.*
Calthrop v. Philippo,

2 *Mod.* 2278
Pasch. 29
Car. 2. *C. B.*
Calthrop v.
Phillips,
S. C. and
 judgment
 was given
 accord-
 ingly, nisi
 and as to
 the ob-
 jection, that
 the old
sheriff
 might have
 occasion to
 plead it, it
 was said,
 that he
 might have
 recourse to
 it in the
 new *she-*
riff's office,
 and that he

could have no title to it by the direction of the writ; for that is *viccomiti Berks*, and not to him
 by his express Christian and surname.

8. It was held per *Cur.* that an assignment of prisoners by an
 * *der sheriff* to the succeeding high *sheriff* (though not by indenture)

is a good assignment. Barnes's Notes in C. B. 271. Mich. 6 Geo. 2. Poulter v. Greenwood. 247.

For more of Sheriff in general, see Appearance, Arrest, Bail, Default, Execution, Return, and other proper Titles.

(A) Statutes; and what is within them.

* This act being a law perpetual, these words extend not only to such person and persons, &c. as at that time had election,

presentation, &c. but to all and every person and persons that at any time hereafter should have election, presentation, &c. otherwise the law should be but temporary, which should be directly against the meaning of the makers of the act; and by the same reason this act extends not only to churches, colleges, schools, hospitals, halls, and societies founded at the time of the making the act, but to all such as should be erected or founded after. 3 Inst. 156.

1. 31 Eliz. cap. 6. **I**F any person or persons, bodies politick or corporate, * which have election, nomination, voice, or assent in the choice, election, presentation, or nomination of any scholar, fellow, or any other person, to have room or place in any church collegiate or cathedral, colleges, schools, hospitals, halls, or societies, shall take or receive any money, fee, or reward, &c. the place, room, office, &c. of the offender, shall be void, &c.

S. 3. And if any fellow, officer, or scholar, in any of the churches, colleges, &c. ut supra, contract or agree for any money, reward, &c. for the leaving or resigning up of the same his room or place to any other, &c. he shall forfeit and lose double the sum of money, &c. so received; and every person by whom or for whom any money, &c. shall be given, &c. shall be incapable of that place or room for that time or turn, &c.

S. 4. And it is further enacted, that at the time of every such election, presentation, or nomination, as well this present act as the orders and statutes of the same places concerning such election, presentation, or nomination, shall then and there be publicly read, upon pain to forfeit and lose the sum of 40l. &c. whereof the one moiety to him that will sue, and the other moiety to the church, college, &c.

S. 5. Enacts, that if any person or persons, bodies politick or corporate, shall or do, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, * covenant, or other assurance of or for any sum of money,

* See (B)

pl. 15. —
† This is not only intended where the

money, reward, gift, profit, or benefit whatsoever, directly or indirectly + present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any cause or consideration,

person presenting or collating has right to present or collate,

but also where any person or persons, bodies politick or corporate, do usurp, and have no title to present or collate: and so it was adjudged, in case where the usurpation was to a church of the king. 3 Inst. 153.

Note, that in this statute there is no word of simony; for by that means the common law would have been judge what should have been simony, and what not. Nov 25. in case of *Winchcombe v. Pulston*.——The statute of Purpose forbears to use the word simony, for avoiding nice construction of that word in the civil law; and therefore the makers of the act set down plainly the words of the statute, that if any be promoted for money, &c. So that it is not material from whom the money comes. Per Tanfield Ch. B. Lane 103. Hill. 8 Jac. in the Exchequer, in case of *Kitchin v. Calvert*.

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* That then every such presentment, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon shall be utterly void, frustrate, and of none effect in law; and that it shall and may be lawful to and for the queen's majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical for that one time or turn only.

It was resolved per tot. Cur. that if any shall take money, fee, reward, or other profit for any presentation to

a benefice with cure, though in truth he who is presented be not knowing of it, yet the presentation, admission, and induction, are void by the express words of the statute of 31 El. cap. 6. and the king shall have the presentation *hac vice*; for the statute intends to inflict punishment upon the patron, as upon the author of the corruption, by the loss of his presentation, and upon the incumbent who came in by such a corrupt patron, by the loss of his incumbency, though he never knew of it; but if the presentee be * not cognizant of the corruption, then he shall not be within the clause of disability. And so it was resolved by all the justices in Fleet Street, Mich. 8 Jac. fol. 7. 12 Rep. 100. in the case of *Dr. Hutchinson*. And says the statute is very well penned against the avarice of corrupt patrons.

* S. P. 3 Inst. 154. and says it was so resolved Mich. 13 Jac.

But here is to be observed a diversity between a presentation or collation made by a rightful patron and an usurper; for in case of a rightful patron who does corruptly present or collate, by the express letter of this act the king shall present; but where one does usurp and corruptly present or collate, there the king shall not present, but the rightful patron; for the branch that gives the king power to present is only intended where the rightful patron is in fault; but where the rightful patron is in no fault; there the corrupt act and wrong of the usurper makes the benefice, &c. void, but takes not away the lawful title to present from the rightful patron. 3 Inst. 153, 154. says it was so adjudged.

And that all and every person and persons, bodies politick and corporate, that shall give or take any such sum of money, reward, &c. shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical.

Dr. Watson lays he conceives, that if a simoniacal contract is made by

a clerk, or other person, although the patron after presents the clerk gratis, yet the person contracting forfeits the double value of the church. Watf. Comp. Inc. 8vo. 72. cap. 5.

This double value shall be accounted according to the very, or true value, as the same may be letten, and shall be tried by a jury, and not according to the extent, or taxation of the church; whereof one was made both of the spiritualities and temporalities in 20 E. 1. 1292. in the time of Pope Nicholas, of that see 11 H. 4. fol. 35. F. N. B. 176. And Polichron. lib. 7. cap. 38. Rot. Parl. 18 E. 3. No. 44. Stat. 2. 1 R. 2. No. 102. 8 H. 6. No. 15. and the other taxation was made in 26 H. 8. 3 Inst. 154.

And the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend, or living, shall thereupon, and

See the note at the 1st parag. in from this page.—

Sec (K) (L) *from thenceforth be adjudged a disabled person in law to have, or*
 —Such in- *enjoy the same benefice, dignity, prebend, or living ecclesiastical.*
 incumbent so coming in by corrupt agreement is absolutely disabled for ever to be presented to that church, that the king himself, to whom the law gives the title of presentation in that case cannot present him again to that church; for the act being made for suppressing of simony and such corrupt agreements so binds the king in that case as he cannot present him whom the law has disabled; for the words of the act are "shall thereupon and from thenceforth be adjudged a disabled person in law" to have or enjoy the same benefice." And the party being disabled by act of parliament, which being an absolute and direct law, cannot be dispensed withal by any grant, &c. with a non-obstante, as it may be when any thing is prohibited sub modo, as upon a penalty given to the king. Co. Lit. 120. a. —S. P. Walf. Comp. Inc. 8vo. 206. cap. 13. —S. P. 3 Inst. 154. says it was so resolved Mich. 13 Jac.

Ld. Coke S. 6. *It is further enacted, that if any person shall for any sum*
 says he was of money, reward, &c. (ut supra) other than for usual fees, admit, of this par- institute, install, induct, invest, or place any person, in or to any lamment, benefice with cure of souls, dignity, prebend, or other living eccle- and ob- sial: that then every person so offending shall forfeit and lose served the proceedings therein; double value, ut supra; and that thereupon immediately from and after the investing, installation, or induction thereof had, the same and the reason of the clause benefice, &c. shall be estions merely void, &c.

was to avoid hasty and precipitate admissions, institutions &c. to the prejudice of them that had right to present, by putting them to a quare impedit, and no such haste or precipitation is used but for reward, &c. as it is to be presumed. 3 Inst. 155.

* And albeit the church is full by the institution, &c. against all but the king, yet the church becomes not void by this branch of this act, until after induction. 3 Inst. 155 —S. P. Walf. Comp. Inc. 8vo. 83. cap. 6.

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This is intended of *And that the patron, &c. shall and may present, &c.*
 the rightful patron, or of him that has right to present. 3 Inst. 155.

This is to S. 7. *Provided that no title to confer or present by lapse shall*
 be intended of such accrue upon any avoidance, mentioned in this act, but after 6 of such voidances months notice given by the ordinary to the patron.

only by season of simony, where the presentation is not given from the patron to the king, that is where the person obtains his orders, admission, institution, induction, &c. simoniacally; for no lapse can incur at all where the right of presentation is in the king. Walf. Comp. Inc. 8vo. 71. cap. 5.

* See (E) Pl. 5. S. 8. *And be it further enacted, that if any incumbent of any benefice with cure of souls shall corruptly resign or exchange the same, or corruptly take for or in respect of the resigning or exchanging of the same, * directly or indirectly, any pension, sum of money, or benefit whatsoever; that then as well the giver as the taker, &c. shall lose double the value of the money so given, and double the value of one year's profit, one moiety thereof to the queen, and the other moiety to him that will sue for the same in any of her majesty's courts of record.*

S. 9. *Provided that if any person or persons shall or do receive or take any money, reward, &c. ut supra (ordinary and lawful fees only excepted) for to procure the ordaining or making of any minister, or giving any orders or licence to preach, shall for every offence forfeit and lose the sum of 40l. and the party so corruptly made minister shall forfeit and lose the sum of 10l. and if at any time within 7 years after such corrupt entering into the ministry, he*

he shall accept or take any * benefice, living, or promotion ecclesiastical; that then immediately from and after the institution, investing, or installation thereof, or thereunto had, the same benefice, living, and promotion ecclesiastical shall be eftsoons utterly void, &c.

* This word benefice ecclesiasticum extends not only to benefices of

parochial, but to dignities and other ecclesiastical promotions; as to deanries, archdeaconries, prebends, &c. and it appears in our books that deanries, archdeaconries, prebends, &c. are not comprehended under the name of benefices with cure of souls; but they are not comprehended under the name of benefices without cure of souls within the statute of 21 H. 8. by reason of a special proviso; which they had if such proviso had been added, viz. deans, archdeacons, chancellors, treasurers, chanters, &c. or a parson where there is a vicar endowed. 3 Inst. 155.

moiety of which forfeitures shall be to the queen, and the moiety to him that will sue for the same, by bill, plaint, or action in any of her majesty's courts of record, in which no protection, privilege, or wager of law shall be admitted or allowed.

The courts of record to be here understood, are Chancery, B. R. the C. B.

and the Exchequer. but not any inferior court of record. Watf. Comp. Inc. 8vo. 77. cap. 5. cites Gregory's case, 6 Co. 20. And says, the privilege and protection herein mentioned are to be taken for the common protection and privileges of officers and courts, but are not to be extended by those general words to the privilege or protection of parliament, as is observed by Parson's Counsellor, 67. Watf. Comp. Inc. 8vo. 77. cap. 5.

2. Simony is odious in the eye of the common law; for a guardian in socage of a manor, whereunto an advowson is appendant, shall not present to the church, because he can take nothing for the presentation, for the which he may account to the heir; and therefore the heir in that case shall present of what age soever he be; and if an heir of tenant in * capite has livery cum exitibus, yet shall not the heir present to an advowson, because no issues or profit can be taken thereof. 3 Inst. 156.

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Latro est qui aurum ex religione scilatur. 3 Inst. 156.—

Simony is the more odious, because it is ever accompanied with perjury; for the presentee, &c.

3. And the common law would have the patron so far from simony as it denied him to recover damages in a quare impedit, or assise of darrein presentment, before the statute of West. 2. cap. 5. 3 Inst. 156.

is sworn to commit no simony.

3 Inst. 156.

4. In debt upon bond conditioned to pay 100l. at Michaelmas, defendant pleads the money was to be paid for resignation of a benefice with intent that another should be presented, and shewed that the patron, obligor, and obligee were parties to the agreement, and demands judgment, because it was upon contract of simony which is against law. The plaintiff demurred, and adjudged for plaintiff, because simony is not against our law, and no such contract or obligation is made void by any statute in our law, nor is it averrable that the money is for other cause than the obligation expresse. Mo. 564. pl. 769. Pasch. 40 Eliz. C. B. Oldbury v. Gregory.

Simony was an offence at common law

before the statute of 31 Eliz. Per Cur. Cro. C. 361. Mackaller v. Todderick.—

Powel J. denied this case of

GREGORY

v. OLDBURY, and cited a case where in action on such bond defendant brought a bill in Chancery against the plaintiff, and because the plaintiff could not give a good account of cause of the taking such bond, the Court granted a perpetual injunction. 12 Mod. 505. Pasch. 13 W. 3. in C. B. Anon.

5. There

5. There are *no accessaries* in simony, but all are principals. Cro. E. 789, pl. 30. Mich. 42 & 43 Eliz. C. B. Baker v. Rogers.

In an assumpsit brought by J. S. for the 20l. by the defendant for procuring the living, the plaintiff had judgment, whereupon the defendant brought error, and the judgment was reversed; for the Court were

6. Information. The church in the Tower of London being a *donative of the king*, became void by resignation, and the defendant agreed with J. S. to give him 20l. if he could procure a presentation, &c. for him from the king, which he did accordingly, and the defendant was inducted; it was insisted, that this being a donative, is not within the *stat. 31 Eliz.* because that *mentions only where one comes in by simony by presentment or collation*; sed non allocatur, because it is within equal mischief: then it was objected, that this could not be within the statute, because the king being donor, it cannot be intended that he presented for simony, and that the patron shall lose his presentation for that time, and therefore shall not extend to any of the king's donations; sed non allocatur. For simony may be between strangers, without the privity of the incumbent or patron. And rule was given to enter judgment for the plaintiff. Cro. C. 330, 331. pl. 15. Mich. 9 Car. B. R. Bawderock v. Mackaller.

vocagreed, that the consideration was simoniacal, and against law, and consequently the assumpsit not good. Jo. 341. pl. 1. Pasch. 10 Car. B. R. S. C. by name of Todderidge v. Mackalley—Cro. C. 337. pl. 24. Mich. 9 Car. B. R. Mackaller v. Toderick, S. C. in error upon the judgment in assumpsit, and argued for the plaintiff in error; but adjournatur.—Ibid. 353. pl. 18. Hill. 9 Car. B. R. S. C. argued for the defendant in error. And Richardson said, he much doubted thereof, because *the promise is, to pay so much for his labour and travel*, and not for the presentation, et adjournatur.—Ibid. 361. pl. 2. Pasch. 10 Car. B. R. S. C. and the Court held the consideration illegal, and that the declaration was ill; for the *promise was to pay him after that he is rector*; and he shews that he was rector by his procurement upon this promise, which cannot be; for *he never was rector, but a person utterly disabled to be a parson by his* * simoniacal contract, and so reversed the judgment.

* A simoniacal presentation does not amount to so much as a claim. Arg. Hard. 47. cites the case of Love v. Jones, 1652. in the Exchequer.

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(B) What is.

Simony is when any person is

1. **SIMONY** is *studiosa voluntas emendi aut vendendi spiritualia, aut spiritualibus annexa*. Cro. E. 789. Baker v. Rogers. presented or collated to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, &c. or has any such given, or bestowed on him, for or in any respect of any sum of money, reward, payment, gift, profit, or benefit, *directly or indirectly*, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, or any sum of money, reward, payment, gift, profit, or benefit, whatsoever, *directly or indirectly*, or for or in respect of any such corrupt cause or consideration. Godolph. Rep. cap. 39. S. 1.

2. Simony is a contract *either with the patron to present, or with the ordinary to institute*; and if it be neither of them it is not simony at common law. *Simonaicus* is the person who makes such promise, and he is made incapable to take any other benefice; but *simoniace promotus* is where a friend of a man not knowing it, gives money to the patron or ordinary, to present, or institute. Per Doderidge J. Rep. 465. Mich. 22 Jac. B. R. in the case of Wilson v. Bradshaw.

3. Presentation

3. Presentation is no profit to the patron, but pre-eminence, and the profits are to the parson; for if the *patron takes the profits*, it is simony. Br. Issues Ret. pl. 21. cites 24 E. 3. 29.

4. In a quare impedit by Grendon against Bishop of Lincoln and Dean and Chapter of Winchester, who defended themselves by a grant of appropriation, three justices were against the plaintiff, and Dyer Ch. J. argued for the plaintiff, and no judgment given. But *ils eux accord' pour un some dargent agard al plaintiff*: and the author of that book was counsel with the said plaintiff. Bendl. 296. pl. 291. Hill. 17 Eliz. Grendon's case. See pl. 13.

5. An obligation was made by the presentee to the patron, to pay 5*l.* annually to the wife and children of the late incumbent, and notwithstanding great opposition to the contrary, the parson keeps and enjoys his parsonage to this day. Noy 142. cited by Foster J. as the Earl of Suffex's case.

6. In ejectione firmæ the point was, the patron takes an obligation of the clerk (whom he presented) that he should pay 10*l.* to the son of the last incumbent, so long as he should be a student at Cambridge unpreferred. By the Court adjudged, that that was not simony, otherwise if it had been to have paid to the son of the patron. And judgment accordingly, by verdict. Noy 142. Baker v. Mountford.

7. The cousin of C. being a clerk, comes to the grantee of the prochein avoidance, and promises him 20*l.* and 20*l.* per annum if he will present C. to the church quando, &c. C. (not knowing any thing of the contract) is presented accordingly; that is simony, a fortiore where S. himself, who was to be presented, was party to the first motion of the contract for presentation. Per Hubbard. Noy. 25. in case of WINCHCOMBE v. PULLESTON, cites it as 7 Jac. in the Exchequer. Calvert v. Parkinson. Lane 71. and 100. S. C. and the arguments at the bar, and on the bench.

8. If a clerk seeks for money, to obtain a presentation unto a void church, though afterwards the patron presents him gratis, yet this simoniacal attempt has disabled him to take that benefice. Watf. Comp. Inc. 8vo. 73. cap. 5. cites it as the opinion of Tanfield Ch. B. in his argument of Calvert and Kitchin's case, and cites Hughes 1816. and Parson's Law, cap. 18. 135.

9. If the Bishop of Canterbury grants a dispensation to J. S. upon a corrupt contract, recipere the church of D. which is void, and afterwards lapse incurs to the bishop as ordinary, and thereupon he collates J. S. to the same church. It was said, that in this case, that it was a collation upon a corrupt agreement within the statute; for that, in such case, the law looks back upon the original act, the dispensation upon the corrupt agreement; by Hobart Ch. J. in the argument of COLT AND GLOVER'S CASE. Hob. 158, 159. Hughes's Abr. 1870.—[But I do not observe this point in that case.] [459]

10. The question in the Court of C. B. was, that a feme sole was seised of an advowson of a church, and the church being void, she presented J. S. to the church upon condition, that he should take the woman for his wife, which he did accordingly. It was resolved in that case, that this was a simoniacal contract, which made This case is abridged in 8 Nelf. Abr. Tit. Simony 341. pl. 4. but cites no book, only adds Noy

148. S. C. [but the case which he means is Noy 142. ABIGAIL BAKER v. MOUNTFORD; but contains no one point mentioned here.]

• So if one promises a clerk, that *inconsideration he will marry his daughter, his woman, &c.* That *he will present him to such a living when*

made the presentation void; for that it was a benefit within the statute to the woman, and an advancement of her: and in that case it was put, that if the patron of a church present J. S. to the church, being void, upon an *agreement that he shall be tutor to the son of the patron*: that although this be not properly a gift, or a reward, yet, in regard it was a benefit to the patron in the tuition of his son, that *the same was within the intent of the statute.* Mich. 8 Jac. in C. B. MOUNTFORD'S CASE. And in the argument of that case, this case was put, contention was betwixt the parson and the parishioners for tithe cyder. The church afterwards became void, and the patron did present J. S. to the church, upon *condition that he should not sue the parishioners for tithe cyder.* It was said, that it was adjudged in that case, that the same was not any simoniacal agreement within the statute; for that it was only to prevent a suit, and a deed of mercy. But if the patron himself was within the parish, and should pay such tithe, then, because the patron had a benefit and profit by such an agreement, it had been a simoniacal contract within the statute. Hughes's Abr. 1869, 1870.

void, or to the next living, or next good living that shall fall void within his gift and disposal, this is a simoniacal contract, for there can be no difference in reason, as to making of a contract simoniacal, whether it be by covenant, or by bare promise; or whether it be to be presented to one church in certain, or to such as shall next fall void; for when the church is become void, and the clerk presented to it pursuant to such an agreement, it is then become as certain, as if the agreement had been to present to that very church; and by Yelverton, one *presented to a living, to the intent that he shall marry the patron's daughter*, is simony, which Richardson denied; but upon what reason the book tells us not. Watl. Comp. Inc. 8vo. 60. cap. 5. cites Lut. Rep. 177. Mich. 4 Car. Steven's case.

Mo. 877.

pl. 1281.

Winchcombe v. the Bishop of Winchester and Puleston S. C. Pasch. 14 Jac. C. B. accordingly; and says, it was pleaded, that the

II. A. was seised of a manor, to which an advowson was appendant. J. S. promised A. that *if he would present him after the now incumbent's death, he would give him 70l. whereupon it was agreed, that the next presentation should be granted to B. &c.* The incumbent died, B. presented S. who continued incumbent from 27 Eliz. to 7 Jac. Then A. granted the manor with the appurtenances to W. in fee. S. the parson died, 7 Jac. and the king presented P. by the title of simony in the last incumbent. W. brought a quare impedit; resolved, that this is simony. Noy 25. Winchcombe v. Puleston.

corrupt agreement was made at a time when the then incumbent lay dangerously ill of a stranguary, and that by the simony, the church remained void from the death of the prior incumbent. Brown. 164, 165. S. C. ——— Hob. 165. pl. 194. S. C. resolved accordingly. ——— Ibid. 193. pl. 245. S. C. but a D. P.

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12. If an incumbent of a church, being upon the design of exchanging his benefice, to get his patron's consent to promote another thereto, does *promise that the clerk shall make a lease of the glebe or tithes to the patron, at a certain rent*; and the clerk is presented, and does make the lease accordingly, although that he knew not of the contract, yet this is simony. Watl. Comp. Inc. 8vo. 55. cap. 5. cites Hill. 16 Jac. C. B. Rot. 667. Grant and Bowder's case.

13. In action upon the *case*, the plaintiff declared, that whereas
upon

upon a communication between him and the defendant, concerning the presentation to the church of M. and the plaintiff affirmed, that the presentation belonged to the king who had granted it to him, and the defendant affirmed it belonged to the university of Oxford, by reason of the recusancy of the patron; and that they both suing for admission, &c. the defendant, in consideration the plaintiff would desist from endeavouring to get admission, &c. and would keep the recusant from disturbing him, that then he *vellet solvere* to the plaintiff 30*l.* and a gelding worth 10*l.* and Jones J. seemed to think this simony; and that it was the same thing to promise not to prosecute his admission for 10*l.* as in consideration of 10*l.* to present him. Ley Ch. J. said, that the honesty and integrity of the plaintiff moved him to think, that the consideration was the expences of purchasing the letters patents, &c. and the rather because the church was worth 100 marks per annum; so that it could not be a recompence for the presentation, but that it was ill drawn by the clerk; but that expences are lawful considerations, supposing that to be the case, but otherwise he doubted it was simony: but Doderidge thought it not simony. 2 Roll. Rep. 463. Mich. 22 Jac. B. R. Wilson v. Bradshaw.

14. An archdeaconry is an ecclesiastical preferment, of which there are three sorts. 1st, *De jure*. 2dly, By prescription. 3dly, By covenant. It was a question moved in the Court of C. B. 9 Car. if an archdeaconry *de jure* were within the statute of 31 Eliz. and if a gift or reward were given for such a dignity, whether it was within the statute: it was holden, that it was directly within the statute. But it was conceived, that where an archdeaconry is *by prescription, or by covenant between the bishop and archdeacon*, that such an archdeaconry might be out of the statute. For although the word (*covenant*) be within the statute, yet it was said, that the same shall be taken to extend only where a covenant is made for a sum of money for such an archdeaconry, which is *de jure*, and shall not extend to archdeaconries by prescription, as to the archdeaconry of Richmond, or other the like archdeaconries, which time out of mind have been holden by covenant between the bishop and the archdeacon: and therefore it was said, that if J. S. covenant with the bishop to pay him 10*l.* per annum out of such an archdeaconry, that such a covenant was out of the statute of 31 Eliz. And it was there said, that an archdeaconry by prescription was as strong as one *de communi jure*. Hughes's Abr. Tit. Statutes, 1871. pl. 9. cites Mich. 9 Car. in C. B. accordingly.

3 Nelf. Abr. 242. Tit. Simony (A) pl. 15. S. C. cites no book, but is an extract of Hughes's Abr.

15. Promise of money to procure him to be made rector of a void rectory, is simoniacal, and against law. Jo. 341. Pasch. 10 S. C. Car. B. R. Totteridge v. Mackalley.

16. A. seised in fee of the advowson of a rectory, &c. and being also incumbent of the same church, mortgaged the advowson to J. S. in fee, and died; the church being now void, one W. R. presented D. by usurpation; and D. was admitted, whereupon J. S. the mortgagee brought a *quare impedit*, and pending the suit, one B. the heir of A. brought a bill in equity to redeem, and that J. S. should

Skin. 50. S. C. And the Court seemed clearly to hold this simony, because the presentation

ation by
usurpation
being
avoided,
the church
shall now
be said
void, from
the death of
the last in-
cumbent,
and may be
so pleaded
without
taking no-
tice of the
usurpation,
which was
a mere nul-
lity, and
the judg-
ment is an
estoppel for
all men to
say that the
church is

should permit him to bring a quare impedit in his name to re-
cover the church and the presentation; *pending this one C. en-
tered into articles with B. for the purchase of the advowson; and
therein B. covenanted to convey to C. in fee, and that he would
present such clerk to the present avoidance, as C. should appoint;
and C. covenanted to pay B. 100l. upon the delivery of his writings
concerning the title; 50l. on the first of May next after the delivery
of the writings, * and 50l. more when he should obtain judgment on
the quare impedit, and 200l. more upon perfecting the conveyance;*
the jury found all this done, to the end that E. the defendant
might be presented when the recovery should be had in the quare
impedit. J. S. recovered, and D. was removed; and J. S. at the
nomination of C. presented E. who was instituted and inducted;
but the conveyances were not yet perfected. The king presented
Lake, who was instituted, &c. And resolved by all the Court,
that this was simony; so that the king has title to present, and
the presentation of E. void: and judgment for the plaintiff.
3 Lev. 115, 116. Pasch. 35 Car. 2. C. B. Walker v.
Hamersly.

full; and if the church should be said to be full upon an usurpation, this would be a means to
elude the statute; for then it is but getting one to usurp, and the patron may sell the next avoidance
to whom he pleases, and then bring a quare impedit, and remove the usurpation, and so the grantee
come in.——S. P. 2 Vent. 39, 40. Pasch. 35 Car. 2. C. B. seems to be S. C.——
3 Salk. 323. cites S. C.

* [462]

17. *Selling a curacy, and taking money to admit into orders is
simony, and punishable by the metropolitan. Carth. 485. Pasch.
11 W. 3. B. R. Bishop of St. David's v. Lucy.*

Simony is
an offence
by the
canon law,
of which
the com-
mon law

18. *The common law takes no notice of any simony but what the
statute mentions, which has not defined simony in such a manner
as to say what shall be simony, and what not, by the spiritual
law. 12 Mod. 238. Mich. 10 W. 3. Bishop of St. David's
v. Lucy.*

takes no notice to punish it; for there is not a word of simony in the statute of Eliz. but of buying
and selling. And the canons of 1603 make simony a great offence; and to those canons the
clergy are subject, though some question has been made as to the canons of 1640. Per Holt
Ch. J. Ld. Raym. Rep. 449. in S. C.

19. Note, it was held that by the *counsel of Chalcedon* received
in England, Can. 2. and counsel of London, it is simony to take
money pro institutione or ordinatione, and that forging of orders
was originally of spiritual conusance, and not by the act 31 El.
12 Mod. 240. Bishop of St. David's v. Lucy.

(C) By whom it may be to make a Forfeiture.

1. IF A. has the *presentation*, and B. has the *nomination* to a
benefice, and the presenter, upon a corrupt agreement,
makes a presentation unknown to the nominator, the nominator
shall not be prejudiced within this statute. Arg. Lane, 74. in
case of Calvert v. Kitchin.

2. Where

2. Where the incumbent made a simoniacal agreement with the wife or friend of the patron, and the patron knows not thereof, and the incumbent is presented thereto by means of the simoniacal agreement so made, he is within the statute 31 Eliz. and the king may present. Cro. J. 385. pl. 16. Per Coke Ch. J. Mich. 13 Jac. B. R. The King v. the Bishop of Norwich, Cole and Saker.

Roll. R. 236. S. C. Godolph. Rep. cap. 39. S. 8. cites S. C. and P. for the contract of the wife is

the contract of the husband.

(D) By whom it may be made to make a Forfeiture. By a Stranger. [463]

1. IF the brother gives money to the patron to present his younger brother, being then a student in the university, the church being then void, and the patron presents accordingly, this is simony. Watf. Comp. Inc. 8vo. 62. cap. 5. cites Parson's Law, cap. 18. fol. 134, 135. Pasch. 39 Eliz. Bulhe's case.

So where A. having the next avoidance of an advowson, the church becomes

void, and a day after the avoidance B. contracts to have the presentation for 100l. and upon this B. presents W. B. his brother, who knew nothing of the money given till after the induction, and then his brother shewed it to him, and prayed him to have consideration of it. W. B. was cited into the Spiritual Court, and there has sentence for the simony, and brings a prohibition, supposing that inasmuch as the right of presentation was in debate, because if it be simony the king is to present, therefore the Ecclesiastical Court shall not hold plea of it; but upon argument a consultation was awarded, because simony is properly determinable by the Ecclesiastical Court, and the case shews a simony apparent; but the cause of the prohibition was surmised further, that A. after the church avoided, granted to B. the presentation, and B. presented W. B. which presentation was tortious, because the estate and title of B. by grant made after the church became void, was void; and yet the Court Christian holds plea of the simony upon the presentation of B. notwithstanding which, the Court granted consultation; for though the grant made of the presentation was void to B. yet when B. in fact presented W. B. and W. B. was admitted, instituted, and inducted, it is apparent that W. B. was simoniacally promoted, because the contract makes the simony; and by colour of this contract he was admitted and instituted. And so if usurper presents by simony, the clerk is punishable in the Court Christian for the simony, though the patron recovers the advowson and the presentation. Mo. 914. pl. 1292. Mich. 42 & 43 Eliz. C. B. Baker v. Rogers. S. C. cited as adjudged. Mo. 753. pl. 1035. in the case of Ellis v. Warner. S. C. cited by Tanfield Ch. B. Lane 103. in case of Kitchin v. Calvert. Cro. E. 788. pl. 30. S. C. says, that after several arguments they all agreed that consultation be awarded. [And immediately after says] Note, no consultation awarded upon the roll.

2. So it is in case that a testator contracts by simoniacal contract, that his executors shall present such a man by name, the church being then void, and the testator dies, and his executors do present the same person accordingly, this also was adjudged to be simony. Watf. Comp. Inc. 8vo. 62. cap. 5. cites Parson's Law, cap. 18. fol. 134, 135. Mich. 3 Jac. Freeman and English's case.

3. Sir George Cary being seised of an advowson, granted the next avoidance to his second son, and died, and after the son corruptly agreed with J. S. to procure the said J. S. to be presented to this benefice,* and the 2d brother knowing thereof, it was agreed, that for the perfecting of the agreement, the 2d brother should surrender his grant and interest to the elder brother, which elder brother not knowing of the said corrupt agreement, presented the said J. S. who was instituted, &c. All shall be void; for he is presented here by reason of this corrupt agreement between the patron who then

* So it is in the original, but these words (and the 2d brother knowing thereof) seem to be surplusage.

was, and the parson; and the elder brother was only used to convey a bad gift by a good hand, and all had reference to the corrupt agreement, with the assent of the patron who then was. Arg. Lane 73. in case of Calvert v. Kitchin and Parkinson, cites it as the case of Crosse v. Pomcoyes.

In this case was cited Dr. DUNTON'S CASE, and that he had enjoyed the church of St. Clement's more than 20 years under such title from the king,

4. Error to reverse a judgment in a quare impedit, where the king had recovered upon a title of simony. The agreement was, that a friend of the clerk should give J. S. so much money to procure him to be presented, and that he was presented secundum agreementum præd. the error assigned was, that *neither the patron nor clerk knew of any thing given*. But per Cur. he was simoniace promotus, and the presentation secundum agreementum præd. is a good averment of a simoniacal promotion. And the judgment was affirmed. Sid. 329. pl. 10. Pasch. 19 Car. 2. B. R. The King v. Truffel.

the presentee of the patron being ousted, because a friend had given * money to the page of the Earl of Exeter to procure it for him, and yet neither the lord nor the parson knew any thing of it. Ibid.

The intent of the statute was to eradicate all manner of simonies; and therefore the words are not, if any man give money to be presented, but they are, if any present for money. Per Baron Bromley. Lane 100, in case of Kitchin v. Calvert.

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5. In quare impedit the plaintiff declared that J. S. was seised of the advowson in fee, and presented W. and granted the next avoidance to C. B. and that the church became void by the death of W. and then sets forth the statute 31 Eliz. of simony; and that the church being so void, it was corruptly *agreed between R. a friend of C. B. and one T. but in the behalf of C. B. that he should present Hide, and that T. should pay to R. 20l. per annum for 6 years, if Hide should so long live*; and that pursuant to this agreement T. came bound to R. in 200l. conditioned for the payment of 20l. per annum, as aforesaid, which bond was *to the use of C. B. who presently thereupon presented Hide*, who was instituted, &c. which by virtue of that statute was void, and so it belonged to the king to present, &c. The defendant Hide, the now incumbent, with a protestando to the agreement and bond, pleaded that he had no notice of the agreement at the time of the presentation, or before: to this plea the Attorney General demurred; C. B. with a protestando to the agreement and bond, pleaded that the * presentation was made freely, and traversed the corrupt agreement, upon which they were at issue. Upon demurrer it was resolved per tot. Cur. that the notice is not material, because in such cases it is very difficult to be proved, and the patron may trust a friend, as here he did, to make the agreement, and before notice thereof given to him may present upon assurance, by certain signs made between them, intimating that such agreement is perfected, and gave judgment accordingly, but cesset executio till the issue be tried. 3 Lev. 337, 338. Mich. 4 W. & M. C. B. The King v. the Bishop of Norwich, Hide and Boughton.

* The report is (que l'auter defendant luy presente sponic.)

(E) What

(E) What amounts to Simony *before Avoidance.* See (B)

1. **I**NCUMBENT being ill, the father contracts for the next avoidance, in presence of the son, the incumbent dies, the father presents the son, the son is inducted, and being sued for the simony in the Ecclesiastical Court, pleads the general pardon of 35 Eliz. in which simony is not excepted, and because the judges there would not allow it, a prohibition was granted; but the Court held that notwithstanding the pardon he was deprivable; *quod quære*; but it was * agreed clearly to be simony; but if the son had not been privy to the bargain, all the justices but Anderson thought it was not simony; but they agreed that if a stranger buys the next avoidance, and presents one that is not privy till after, and after is made privy, and is presented, it is simony: Not so where the father buys, because he is bound in nature to provide for his son. Mo. 916. pl. 1299. Pasch. 41 Eliz. Smith v. Sherborne.

Cro. E. 685. S. C. held by 3 justices, that it was no simony, notwithstanding the son's being present at the contract.

* Cro. E. 686 S. C. contra, but if the parson himself had contracted with intent that another should present him, it is simony.

2. If J. S. has an advowson, and A. purchases the next avoidance to the intent to present B. and the church becomes void, and A. presents B. this is simony by averment, and by good pleading the presentation of B. shall be adjudged void. Per Snig Baron. Lane 102. Hill. 8 Jac. in the Exchequer, in the case of Kitchen v. Calvert.

3. If in the grant of a next avoidance, it appears that it was to the intent to present his son or his kinsman, and it was done accordingly, this was simony. Per Hobart Ch. J. Noy. 25. in case of Winchcombe v. Puleston.

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Dr. Watson in cap. 5. of the Complaint Incumbent says, that his thoughts are, that seeing (whatever

4. Godb. 390. pl. 475. Pasch. 3 Car. B. R. Anon. says, it was cited to be adjudged, that if a man purchases the next avoidance of a church, with an intent to present his son, and afterwards he presents him, this is simony within the statute.

the law is in other countries, where the canonists have cognizance of advowsons,) it was before the statute against simony, and now is, lawful with us, to buy and sell, bona fide, the next avoidance of a full church, he supposes it was, and is lawful, as well for all subjects as for some; and supposing that to buy the next avoidance of a church when the incumbent is sick in his bed ready to die, is simony in one man, he cannot but think that it is simony in another, though it be the father of a son capable thereof. And supposing that for a stranger to purchase the next avoidance in the presence of his friend, or only with an intent to present his friend, presenting him accordingly, is unlawful, he conceives this is equally unlawful in a father, with respect to his son; for if it be simony to buy and sell in these cases, it is simony (at least in the Temporal Court) by reason of the statute, and the word *indirectly* therein; and it is most plain that the statute does not give any colour to such distinction; for the words are, *if any person or persons, bodies politick or corporate, &c.* And so are most general; and where the law does not distinguish, we ought not to distinguish. Neither is the reason, that a father is bound by nature to provide for his son, good to the aforesaid purpose; for a man is bound by nature also to provide for himself, and so might as well purchase for himself: and if this reason should make that not to be simony in the case of a father, which is simony in another person, before the church is void, it might as well do the same after the church is void; for the father's obligation continues, he is still bound in nature to provide for his son: and it is no more simony in a friend to buy, with respect to his friend, when the church is void, than it is in the aforesaid cases before it is void (as it has been held). And then, why should it be more simony in the father to buy, with respect to his son, when the church is void, than before it is void? Unless the reason why he of all men might buy before the church is actually void, was changed and gone, as it is not; and by the statute there is nothing more of simony in buying directly than indirectly; and therefore, if the said reason excuse the father before the church is void, it may as well excuse him after it is void, and by consequence it does excuse him in neither case, unless in

the judgment of those that can be so absurd as to hold, that no human law ought to be made, or if made, ought to be expounded, to restrain this natural liberty, or (as they may call it) duty in the father. However, to avoid questions of law, it is best that a purchaser of a next turn (whether he design it for son, kinsman, or stranger) does make the contract, when the incumbent of the church is not in danger of death, that he does not declare his intentions to the person to whom he intends a kindness, or whom he intends to present, that the intended clerk be not present at the contract; however, that he be not named in the deed by which the power of presentation or nomination is granted.

5. In a quare impedit Hutton said that it was adjudged in Chancery, that the grant of the next avoidance for money, when the incumbent was *sick in his bed ready to die*, is simony; for the statute is, if the contract be made *directly or indirectly* by any ways or means. Winch. 63. Pasch. 21 Jac. C. B. Sheldon v. Brett.

S. C. cited
Lutw. 346.
in case of
Pyke v.
Pulleya.

6. *W. B. the father covenanted that T. B. his son should marry the defendant's daughter Anne, and in consideration of this marriage the defendant covenanted to pay 300l. and W. B. covenanted to assure such lands to his son and wife for a jointure; and there were other covenants for the value thereof, and quiet enjoyment; and M. among other covenants covenanted that he would procure T. B. to be presented, &c. and inducted into such a benefice.* In debt upon the bond for performance of covenants the plaintiff assigned a breach in the last covenant. The defendant demurred, because this covenant is against law, and a simoniacal agreement; and so a bond for performance thereof is not good. But all the Court held, that if it had been in consideration of the marriage of the son, &c. that he would have procured him to be presented, &c. into such church, that had been a simoniacal contract; but here *this is a mere distinct covenant, and independent upon the former,* and that without special averment it, or shewing that it was a simoniacal contract, it shall not be so intended; but it may be a covenant upon a good consideration; wherefore it was adjudged for the plaintiff. Cro. C. 425, 426. pl. 16. Mich. 11 Car. B. R. Birt v. Manning.

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7. If *A. being seised of an advowson, grants the next presentation to B. and B. makes a bond to A. to pay him 20l. when the church shall fall void*, this is simony; per Reeve J. And so he said it was adjudged in this Court in POOLE's case. And the whole Court did agree, that it was simony; for otherwise by this way the statute should be utterly defeated. And note, that it was said by Serj. Rolls at the bar, that it had been often adjudged, that the obligor could not avoid such an obligation without special averment. March. 158. pl. 228. Hill. 17 Car. Anon.

(F) Bonds of Resignation.

S. C. cited
Hutt. 111.
in the case
of Babington v.
Wood.—
S. C. cited
Cro. C. 180.

1. **D**EBT upon an obligation of 1000l. It was upon condition *to resign a benefice*, (which the plaintiff had presented the defendant unto) *when the son of the plaintiff should be of years capable to be presented thereunto*, to the intent, that he might be presented to the same benefice. It was moved, that it appears by the

the condition to be a simoniacal contract, and so the bond void; in S. C.— but it was adjudged in B. R. and afterwards affirmed by all the judges in a writ of error brought in the Exchequer Chamber, that the obligation and condition of it were both good. Cro. J. 248. pl. 8. Trin. 8 Jac. Johns v. Lawrence. S. C. cited Jo. 220. in S. C.— But Noyes. Trin. 15 Jac. C. B. it was

said by the Court upon evidence, that if the patron presents one to the advowson, having taken an obligation of the presentee, *that he shall resign*, when the obligee will, *after 3 months warning*, that that is simony within the statute of 21 Eliz. cap. 16. Sir John Paschall v. Clark.

Dr. Watson says, this case of Paschall being against the resolution of Jones and Lawrence's case, solemnly settled not many years before, does not, as he had been told, pass for any great authority; and there have been very many resolutions agreeing with Jones and Lawrence's case since that time. Besides, it appears not by the roll cited, that there ever was any trial had, or verdict or judgment given in the case; or if there was any such trial and saying as is reported, yet it appears not by the record, that such matter could any ways tend to determine the issue there taken. Watf. Comp. Inc. 8vo. 67. cap. 5.

It the condition of such bonds be more special (viz.) to resign *when A. the patron's son, kinsman, or friend, becomes qualified* to take that living; so that it appears to be taken in prospect and favour of some infant designed to have that living when he attains his age, and becomes qualified to hold it; in such case the incumbent must resign according to the condition of his bond, or pay the penalty of it, else he will not find any favour or protection in the Court of Chancery, but will be left to law, yet in that case of particular condition the *patron shall not carry the bond, or make use of it farther than is expressed* in the condition; for if it be to resign when A. his son, &c. becomes qualified, if A. dies, or is never qualified, he shall not compel a resignation by it for any other son, &c. than he that is named in the said condition. And lastly, if it appear that any ill use was intended to be made of any resignation-bond, the Court of Chancery will relieve against it. Watf. Comp. Inc. 8vo. 95, 66. cap. 5.

Sir Simon Degg affirms, that in the case of Jones and Lawrence the sense of the Court was, that if a man be preparing his son for the clergy, and having a living in his disposal, which falls void before his son is capable thereof, he may lawfully take a bond of such person as he shall present, to resign when his son becomes capable of the living. Godolph. Rep. cap. 39. S. 5. cited Parson's Counsellor, par. 1. c. 5.

Where the patron had taken a bond to resign, *when his son should be in orders and qualified*, yet having made an ill use of the bond some time before, the Court would not suffer him to proceed upon it at law, though they seemed all to agree, that these bonds were not prohibited by the law, so far as they were made use of only to keep the incumbent to residence and good behaviour, and to discourage immorality. Chan. Prec. 513, 514. pl. 317. Pasch. 1719. in the case of Hawkins v. Turner, cites it as a case before Mr. J. Blencow lately in the absence of the Ld. Chancellor. Wood v. Lumley.

2. A bond was conditioned, that the defendant at any time after his admission, &c. shall *resign upon request*. The defendant demurred generally; for that this was simony, and so the bond void. But per tot. Cur. if the plaintiff had *averred, that the bond was made to bind * him to pay such a sum, or to make a lease or any other act* which appears in itself to be simony, then upon such plea it might perhaps have appeared to the Court to be simony, and so the bond void; but as it is pleaded it does not appear that there is simony, because *it may be for a very good reason, as if he be non-resident or takes a 2d benefice by a qualification*. And judgment was given for the plaintiff. Cro. C. 180. pl. 4. Hill. 5 Car. B. R. Babington v. Wood. Hutt. 111. S. C. accordingly; and says, that upon error brought in the Exchequer Chamber, the judgment was affirmed—Jo. 220. S. C. accordingly, and that it was affirmed in

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error upon viewing the precedent of Jones v. Lawrence, * Mich. 37 & 38 Eliz.

* [This is misprinted, and should be Trin. 8 Jac.]

Debt upon a bond for a great sum of money. The defendant pleaded, that the condition was for a parson's resigning his benefice. On demurrer, per Powell and Blencow being only in Court, jud' pro quer' and Powel J. was of opinion, that when first the judges have held these bonds good, if they had foreseen the mischief of them, they would have been of another opinion; but now that opinion has prevailed, and it is supported only by the possibility that it may be to an honest intent, as that the patron may have a son of his own capable of the benefice; or that he should voluntarily resign in case of non-residence, which may rather argue care in the patron than any corruption of simony; but if these were the real motives, why should they not be specially expressed in the condition?

dution? But as to such a bond as this is to *resign generally*, it may be the parson could not have the benefice without it, and he is thereby tempted to strain a point rather than be without a living, and the common use of them is to have the money; and sure if the thing be simony, a bond for it will be void. And my Lord Coke's notion is not law, where he says, that since the bonds are good there shall be no *averment of simony* upon it. 31 *Eliz.* makes the church void and gives the presentation to the king; and simony was against law before, and simoniacal agreements were void before that statute, though simony itself was only punished in the Spiritual Court. And he said, the case of GREGORY and OLDBURY was not law, Mo. 641. And he and Blencow both held, that here they cannot set aside this bond without a *special cause shewed in pleading*, which is not done. 12 Mod. 505. Pasch. 18 W. 3. in C. B. Anon.

The judgments, that to take and give bond to resign is not simony, have occasioned many corrupt patrons to exact such bonds of their clerks, only that they might thereby make sure (as they think) to themselves a recompence for their presentments. And some inconsiderate clerks (that have given such bonds) have been emboldened thereby to take the oath against simony, though they well understood the base design of their patrons and themselves in taking and giving such bonds, and intended to accomplish them afterwards by submitting to their demands, to the utter frustrating that most religious law against such corruptions; though the judgments in this case were given for the validity of such bonds only because the *defendants demurred generally* to them, and did not aver, that the bonds were made to resign, only to overawe the clerks by fear of after-payments, or to let a lease of the glebe, tithes, &c. For then (as was declared in several cases) it had been simony; but otherwise it could not appear to the Court to be so. Watf. Comp. Inc. 8vo. 66, 67. cap. 5.

* Roll's
Abr. 443.
says no-
thing of
this point
of resigna-
tion,

3. When a condition was to resign upon request, and the plaintiff did assign for breach, that the defendant could not be found to make a request to him; and therefore that he made a proclamation at the church where he was born, and another proclamation at several markets within the same county, thereby giving him notice of his request; yet that this was not sufficient was adjudged upon a demurrer: for that the request ought to have been made to the person himself. Watf. Comp. Inc. 8vo. 65, 66. cap. 5. cites Mich. 8 Car. B. R. * Gruit v. Rinnel, Roll's Abr. 1. p. 443.

Sid. 387.
pl. 24. S. C.
but reports,
that the
defendant
pleaded in
C. B. Quod
resignavit;
to which
the plaintiff

4. In debt upon bond conditioned to resign upon request, the defendant pleads, that he did resign according to the condition, which was found against him; and judgment for the plaintiff. The defendant brought a writ of error, because it was a simoniacal condition; but the judgment was affirmed, because the condition is good. Raym. 175. Hill. 21 & 22 Car. 2. B. R. Watson v. Baker.

replied, non resignavit; whereupon the defendant demurred generally: and that judgment was given in C. B. for the plaintiff upon this single doubt, scil. whether the resignation here shall be tried per pais or by certificate? And they held, that it should be tried per pais, and that the writ of error was brought hereupon in B. R. and that this was the matter insisted upon in the writ of error, which he himself argued, and there gives his argument, and concludes, that the cause was compromised, and the Court gave no opinion in it. [And in Sid. there is nothing mentioned of the point of simoniacal condition.]——2 Keb. 446. pl. 12. Baker v. Watson, S. C. in B. R. and reports, that the Court held the condition good; and inclined, that the resignation should be tried per pais, and not by certificate. Sed adjournatur.

[468] 5. Lord Keeper North said, he was not satisfied that such a bond was good in law; that the precedents that were in the case were not directly to the point, whether such bonds are *simoniacal or not?* And directed the plaintiff to declare on this bond, and the defendant to plead simony; and after judgment at law, to come back hither. Vern. 131. Hill. 1682. pl. 115. Grahme v. Grahme.

6. The

6. The defendant, patron of a church in Gloucestershire, took a bond from the plaintiff to resign upon request. Upon hearing the cause a perpetual injunction was decreed against the bond; for the Court and all sides agreed, that the bond was good; yet if the *patron made use of it* to his own advantage, by *detaining tithes*, or the like, the Court would relieve against the bond; and in this case the patron did detain his tithes from the plaintiff, whom he had presented; *he* in his answer *pretended a modus decimandi*, but made no proof of it; and being patron of several other churches had taken bond from those he had presented, and made ill use of it. 2 Chan. Cases, 186. Mich. 2 Jac. 2. in Canc, *Durston v. Sands*. Vern. 411. pl. 387. S. C. accord. ingly, by reason of the ill use the patron made of the bond.—— 2 Chan. Rep. 398. S. C. and adds, that upon the defendant's giving notice to the

plaintiff to resign, the plaintiff did accordingly resign the rectory into the hands of the bishop, who refused to accept the said resignation, and ordered the plaintiff to continue to serve the cure; declaring, he would never countenance such unjust practices; but ordered his register to enter it as an act of Court, that the defendant had tendered his resignation, but that the bishop had rejected it. And that the defendant insisted, that the reason of his arresting the plaintiff on the said bond was his non-residence and litigious carriage to the parishioners. But a perpetual injunction was awarded.——S. C. cited Chan. Prec. 513. pl. 317. Pasch. 1719. in the case of *Hawkins v. Turner*. In which last case it was agreed, that a bond given to resign on request should not be made use of to turn out the incumbent, unless for non-residence or some great misdemeanor; nor would the ordinary accept of a resignation offered by the incumbent, without some such cause shewn; but if the patron made use of the bond to *extort money* from the incumbent; without some such cause shewn, this Court would grant an injunction.

7. A. presented a parson to a living, and took a bond to resign upon request at any time within 7 years. A.'s housekeeper, being the parson's sister, *got away the bond*, and delivered it over to the parson. A. brought bill to discover and to be relieved. The defendants demurred, and the demurrer allowed. 2 Vern. Rep. 242. Mich. 1691. in the case of *Bainham v. Manning*, cited per Ld. Commissioner Hutchins as the case of Mr. Fortescue.

8. T. P. vicar of S. covenanted to permit the defendant to receive to his own use the tithes and dues of his vicarage for one year, and to make a grant thereof, upon request, to the defendant for his life, &c. and that at the request of the defendant he would by all lawful means surrender the said vicarage, so as the defendant might present; and the said defendant covenanted to pay the plaintiff 150l. for and in lieu of the said tithes, &c. and avers, that T. P. had performed all on his part, but that the defendant had not paid the 150l. The defendant pleaded in bar to this action, that T. P. died at S. within the year, so that the defendant could not take the tithes for a year according to the agreement. Upon a demurrer it was insisted (inter alia) for the plaintiff, that the covenant is, that the said T. P. by all lawful means should resign upon request of the defendant, which in effect is all one as if he had said, that T. P. should resign, if by lawful means he might, so that no resignation was to be unless it might be by lawful means; but that had those words been omitted the contract had not been simoniacal; for payment of the 150l. is a *distinct and independent covenant*; and the case of *Byrt v. Manning*, Cro. C. 425. was cited as a case in point. And the plaintiff had judgment

3 Nelf. Abr. 343. pl. 19. cites S. C. says, that it was adjudged, that the contract was simoniacal.

ment by the opinion of the whole Court. Lutw. 343. Trin. 5 W. & M. Pyke v. Pulleyn.

9. If A. bind himself to resign a benefice, he ought to *procure the bishop to accept his resignation*. Lutw. 693. Arg. in the case of Studholme v. Morison.

* 10. A resignation bond *comes as near simony as can be*: for it is easy to secure a round sum by such a bond. I do not approve the giving or taking it, and a worthy man will not give it. Per Holt Ch. J. Cumb. 394. Mich. 8 W. 3. B. R. Swain v. Carter.

11. The *guardian of an infant presented to a living, and took a bond from the incumbent to resign within 2 months after request of the patron or his heirs, it being designed that he should have the living himself when capable. The patron afterwards died an infant at the university, leaving 2 sisters his heirs, who pressed the incumbent to resign, and for not doing it, put the bond in suit and recovered judgment; and this bill was brought to be relieved against the bond and judgment. And it was proved in the cause, that they had treated with the incumbent to sell him the perpetual advowson; and had said, that if he would not give 700l. for it, they would make him resign. Ld. Keeper said, the proof in this case lies on the defendant's part, and unless they make out some good reason for removing him, he should certainly decree against the bond. Bonds for resignation have been held good in law. The statute of 31 Eliz. against simony made the penalty upon the lay patron; and he did not remember any case of resignation-bonds before that statute, and they have been allowed since only to preserve the living for the patron himself, or for a child, or to restrain the incumbent from non-residence, or a vicious course of life; and if any other advantage be made thereof, it will avoid the bond; and where it is general, for resignation; yet some special reason must be shewn to require a resignation, or he would not suffer it to be put in suit. If it should not be so, simony will be committed without proof or punishment. A particular agreement must be proved to resign for the benefit of the friend that would be presented, and without such agreement the bond ought not to be sued, but for misbehaviour of the parson; and here are proofs in this case of endeavours to get money out of the plaintiff, and decreed a perpetual injunction against the bond, and satisfaction to be acknowledged upon the judgment; and the plaintiff to give a new bond of 200l. penalty to resign; but that not to be sued without leave of the Court. Abr. Equ. Cases, 86. pl. 3. Mich. 1701. Hilliard v. Stapleton.*

12. The defendant, on presenting the plaintiff to a living, took a bond from him to resign, and after put it in suit and recovered, and levied 98l. and the plaintiff's bill was for relief. The defendant did not by answer pretend any misbehaviour, yet examined to several misbehaviours. And it was urged, that these depositions could not be read, because those misbehaviours were not in issue; and so inclined my Lord Keeper, but after allowed them to be read.

read, and founded his decree upon them. Abr. Equ. Cases, 228. Hill. 1702. Hodgson v. Thornton.

(G) What Right the King has.

1. IF the patron *contracts with one and presents another*, though the contract with the first was simoniacal, yet if the presentation of the other was without simony, the king gains nothing; so there *must be an actual*, though not an effectual presentation; but a bare presentation without any admission intitles the king. Hob. 167. Pasch. 14 Jac. in the case of Winchcomb v. Pulleston.

2. Ld. W. the patron, granted the next avoidance to G. Afterwards the church being void, H. the father of J. agreed with G. that he should permit the Ld. W. to present the said J. and gave him 200l. * G. thereupon procured the Ld. W. to present J. which he did, and J. was instituted and inducted, but did not know any thing of this agreement. It was resolved by the advice of the 2 Chief Justices and Chief Baron, that he was presented by simony, and that by the statute 31 Eliz. cap. 6. it belonged to the king to present without any deprivation of the incumbent, or removing him by a quare impedit: whereupon the king presented L. his clerk, who was instituted and inducted, and continued incumbent for 3 years; afterwards H. sued L. before the high commissioners, and got him to be deprived, and procured a grant of the next avoidance from G. to S. and then procured the said S. to present J. his son, who was again admitted, instituted, and inducted. Adjudged, that the presentation of J. was merely void, and he is a person disabled by the express words of the statute ever to accept of that benefice. Cro. J. 533. pl. 17. Pasch. 17 Jac. B. R. Booth v. Potter.

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s Roll. Rep.
83. Lap-
thorn's case,
alias Beth
v. Potter,
S. C. in the
Court of
Wards, (the
Ld. W. be-
ing then in
ward to the
king) and
resolved ac-
cordingly.
And in this
report it is
said, that
the patron
nor his pre-
senter knew
anything of
the money
given; and
it being in-
firmed, that
J. not being

a simoniacus, but being only simoniace inductus, he was capable according to the civil law to accept a new presentation to the same church; but the judges said, that before this statute such distinction would have served, but that now they ought to make a construction for the further suppression of the said mischief, and in advancing the good of the church; and directed the jury to find accordingly.——Roll. Rep. 837. Mich. 13 Jac. B. R. in the case of the King v. Bishop of Norwich, Cole and Sacker. Doderidge J. said, that before the statute 31 Eliz. by the common law simoniacus was perpetually disabled, but one instituted simoniace was disabled only as to the same church; but that now by the statute it is all one in both cases; for in both cases he shall be perpetually disabled; and that this was resolved in the Exchequer by reason of the generality of the words in the statute; quod suit concessum per Coke.——Ibid. The Reporter makes a remark, that it seems they intend that he is perpetually disabled as to this advowson; for the statute is so.

3. Upon the statute of 31 Eliz. cap. 6. of simony, the king has no interest, but liberty only to present. Per Jones J. Arg. Jo. 23. Hill. 18 Jac. C. B. in the case of Standen v. the University of Oxon and Whitton.

4. In the case of simony the presentation vests in the king without office. Note 2 Vent. 213. Mich. 2 W. & M. C. B. in the case of Woodward v. Fox.

(H) At what Time the King may present.

Mo. 877.
pl. 1231.
Pasch. 14
Jac. C. B.
Winch-
combe v.
the Bishop
of Win-
chester and
Pulleston,
S. C. says
that the
patron, not
having,

since the death of the simoniacal incumbent, filled the church by the presentation, institution, and induction of any other, it is still void, so as the king may present thereto; *but if a new parson had been in possession by the presentation of the patron before the king had presented, it had been otherwise.*——Brownl. 164, 165. S. C. and that Hobart and Winch held that the king had not lost his presentation, because S. never was parson.——Hob. 165. pl. 194. S. C. resolved accordingly.——Ibid. 193. pl. 245. S. C. but a D. P.

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But now see
the statute
of a W. &
M. cap. 16.
which is
said to have
been occa-
sioned by
this very
case, the
defendant
Tho. Bick-
ley being
intirely an
innocent
patron in
every re-
spect.

1. **O**NE was presented by simony in 27 Eliz. which incumbent enjoyed the living till 7 Jac. when he *died incumbent*. Resolved that the *death* of the simoniacal incumbent *does not hinder*, but that the king may well present; for the church was never full as to the king, and that turn is preserved to the king by force of the statute, yet it seems that the church is so full that a stranger may not present for usurpation; for it is not like 7 Rep. where the king is to present by lapse; and there were many cases put, as that church may be full or void in effect, when there is a simoniacal incumbent. Noy. 25. Winchcombe v. Pulleston.

2. Quare impedit was brought against the bishop, Thomas Bickley the patron, and the incumbent Hicks, to present to the church of West Thorney, setting forth, that in the year 1681 the *church was void by the death of the then incumbent Goater*, and thereupon it belonged to J. S. to present; that *during the avoidance a simoniacal agreement was made between M. Rawlins in the behalf of his brother W. Rawlins clerk, and one Bruerton, that M. should pay to Bruerton 220l. who thereupon should procure the patron to present the said W. Rawlins*, that Bruerton received the money, and that Rawlins was presented. The bishop pleads that he claimed nothing but as ordinary. Tho. Bickley demurred to the declaration, the incumbent Hicks pleaded that he is parson imparsonce, of the presentation of Bickley; and that *H. B. J. S. and the said Tho. Bickley were to present by turns: that H. B. had presented the said Goater in his first turn; that J. S. after the death of Goater had presented the said Rawlins in his second turn; and that upon the death of Rawlins, the said Tho. Bickley had presented the said defendant Hicks in his third turn, and traversed the simoniacal agreement*. The plaintiff in his replication prayed judgment against the bishop, and takes issue upon the traverse of simony, and joins in demurrer with Tho. Bickley the patron; and it was objected 1st against the declaration, that the *statute against simony was not recited*; sed non allocatur; yet in the books of precedents the statute is recited. 2dly, That the agreement mentioned in the count was not within the statute, sed non allocatur; and judgment for the king. 2 Lutw. 1090. Pasch. 3 Jac. 2. The King v. the Bishop of Chichester, Bickley, & al.

3. 1 W. & M. cap. 16. Enacts, that *whereas it has often happened that persons simoniack or simoniacally promoted to benefices or ecclesiastical livings have enjoyed the benefice of such livings many years,*

years, and sometimes all their life-time, by reason of the secret carriage of such simoniacal dealing: and after the death of such simoniac parson, another parson innocent of such crime, and worthy of such preferment, being presented or promoted by another patron innocent also of that simoniacal contract, have been troubled, and removed upon pretence of lapse (or otherwise) to the prejudice of the innocent patron in reversion, and of his clerk, whereby the guilty go away with profit of his crime, and the innocent succeeding patron and his clerk are punished contrary to all reason and good conscience.

S. 2. For prevention whereof, be it enacted, that after the death of any person so simoniacally promoted to any benefice or ecclesiastical living, the offence or contract of simony shall neither by way of title in pleading, or in evidence to a jury or otherwise, hereafter be alleged or pleaded to the prejudice of any patron innocent of simony, or of his clerk, upon pretence of lapse to the crown, or otherwise, unless the person simoniacally promoted, or his patron, were convicted of such offence at the common law, or in some ecclesiastical court in the life-time of the person simoniac or simonically promoted or presented.

4. A. mortgaged the manor and advowson of M. to B.— Mortgagee had possession.—The church voids.—A. presents C. simoniacally.—C. is refused by the bishop; then A. presents D. a second presentee, who was an innocent person himself; but fearing the infection of C.'s presentation, surrendered the church to the bishop, and took a new presentation from A. and B.— H. gets a title from the crown, and brings an information in the Attorney General's name to remove the title of B. and decreed the bishop's right of presenting to be set aside, and not given in evidence at law; and per Ld. Cowper the mortgagee is but a trustee for the mortgagor till the equity of redemption is released or foreclosed. 2 Vern. 549. pl. 1706. Att. Gen. v. Hesketh, Scarisbreck and Sudall.

Chan. Proc. 214. pl. 176. Hill. 1702. S. C. by name of the Att. Gen. v. Sudell, Hesketh and Scarisbrick decreed accordingly.

(I) Assent of the King.

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1. IF money be given by the friends of the presentee, and after the king has notice of it, and assents, then it is not punishable, but pardonable at the discretion of the king. Arg. Lane 73. in case of Calvert v. Kitchen.

2. In case of simony, though the king says, the said incumbent shall still continue, yet the king shall have the next presentation. Per Coke Ch. J. 3 Bull. 89. Mich. 13 Jac. in case of the King v. Zakar.

(K) Pardon.

1. IF the king pardons the simony, yet the church remains still void to this presentation. Hob. 167. Pasch. 14 Jac. in the case of Winchcomb v. Pulliston.

The pardon does not make the church to be plena of

2. A

the simonist, but makes the offence punishable only; but if in such case the king presents, his presentee shall have the tithes. Godb. 202. pl. 288. Trin. 10 Jac. C. B. Dr. Hutchinson's case.

The whole Court resolved, that though the general pardon discharged the punishment for simony, yet if the parson comes in by simony it is examinable by the ordinary; for he ought to provide that the church be not served with corrupt persons; and if he finds simony he may well deprive for that cause; and that made that the church was never full of him, and made him no parson ab initio, and the pardon does not enable him to retain it. Cro. E. 685, 686. pl. 21. Trin. 41 Eliz. C. B. Smith v. Shelbourn. — Mo. 916. pl. 1299. S. C. accordingly, but the Reporter says, quod quære. — Ow. 87, 88. S. C. by the name of Eliza Smith's case. And there Glanvil held, that the church was not void till sentence declaratory of the simony, and that by pardon before the sentence all is pardoned; but Walmley and Anderson held that the pardon extended only to the punishment, so that if the patron be charged by the sentence, he may plead the pardon, but shall not prevent the declaring the church void. And Walmley said, it shall *not* bar a 3d person that brings a quære impedit, because the title does not belong to him, but the punishment only; and he doubted whether the king can pardon simony. And Williams said, that the Civilians say that neither the pope nor the king could pardon simony quoad culpam, but only quoad penam they may.

The king's presentee shall not be removed, though the simony be pardoned by a general act of indemnity; for it is an interest vested. 2 Mod. 53. The King v. Turvil. — But if the pardon had come before the presentation, the party had been restored in statu quo, &c. 2 Mod. 53. The King v. Turvil. — Freem. Rep. 197. S. C. adjournatur.

See Prerogative (S. a) 2. A general pardon does not pardon simony. See Sid. 170. Mich. 15 Car. 2. C. B. Phillips's case. Pl. 15.

3. It seems agreed, that notwithstanding the king's pardon to a simonist coming into a church contrary to the purport of 31 Eliz. 6. or to an officer coming into his office by a corrupt bargain, contrary to the purport of 5 & 6 E. 6. 16. may *save such clerk or officer from any criminal prosecution* in request of the corrupt bargain; yet shall it *not enable the clerk to hold the church*, nor the officer to retain his office, because they are absolutely disabled by statute. 2 Hawk. Pl. C. 396. cap. 37. S. 56.

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See (A) pl. 1. S. 5.

(L) Disability.

S. P. Per Coke Ch. J. Cro. J. 385. in the case of the King v. Bishop of Norwich and Saker. — S. P. Per Doderidge J. 2 Roll. Rep. 465.

1. **I**F one be presented by simony, and he who is presented is party or privy to the simony, he shall be deprived and always disabled to take any other benefice. But if he be presented by simony between two strangers, whereto he is not privy, he is deprivable by reason of the corruption, but not disabled to take any other: per Warburton J. who said, that this is the rule of the civil law. Cro. E. 789. Mich. 42 & 43 Eliz. C. B. in case of Baker v. Rogers.

Mich. 22 Jac. B. R. in the case of Wilson v. Bradshaw. But says, that simoniacus promotus is not disabled to take even the same benefice if he comes duly by it again; but if the right of the person be disturbed it is otherwise. — But see (G) pl. 2. where it is resolved per Cur. that simoniacus promotus is a person disabled by the express words of the statute ever to accept of that benefice again. Cro. J. 353 pl. 17. Pasch. 17 Jac. B. R. Booth v. Potter.

* Sir Simon Degge, in his Parson's Counsellor, takes this opinion to be more rational than the other, by reason of the penning of the statute; the words of which are, that the person so corruptly taking, procuring, seeking, or accepting, shall, &c. from thenceforth be adjudged a disabled person in law, to have or enjoy, &c. And though the incumbent in this case take and accept the benefice upon the corrupt contract, yet as to him it is not corruptly taken. Parson's Counsellor, 58. but quære. Watf. Comp. Inc. 8vo. 75. cap. 5.

2. In a suit for tithes in the Ecclesiastical Court, or for treble damages at the common Law, the parishioners may plead *him no parson*;

parson; because of the simony. Hob. 168. Pasch. 14 Jac. in case of Winchcomb v. Pulleton.

3. By 1 W. & M. cap. 16. *No leases really, and bona fide made by any person, simoniacally promoted, for good and valuable consideration, to any person not being privy to, or having notice of such simony, shall be impeached or avoided by reason thereof.*

(M) Securities given. In what Cases avoided.

1. **B**OND given upon a simoniacal agreement shall not be avoided by pleading simony; per Coke Ch. J. who says it was so adjudged in C. B. 2 Bulf. 182. Hill. 11 Jac. Sir William Boyer v. the High Commissioners.

Noy 25. S. P. in case of Winchcomb v. Pulleton.

— It has been always held, that contracts for simony, being against law, are void; per Holt Ch. J. Carth. 252. Mich. 4 W. & M. B. R. in case of Barlet v. Viner.

The obligor, in case of simony, is admitted to *aver against the condition of a bond, or against the bond itself for necessity's sake.* Carth. 301. Pasch. 6 W. & M. in case of Fodey v. Hains.

2. If A. is bound to present B. and he presents him by simony, yet the bond is forfeited. Noy. 25. Winchcomb v. Pulleton. Hob. 182. S. C. & P.

3. See (A) pl. 8. TOTTERIDGE v. MACKALLY, that a promise of money to procure him to be made rector of a void rectory, is no good consideration for an assumpsit.

(N) Pleadings.

1. **T**HE king brought a quare impedit, and declares, that Richard White was seised of the manor, to which the advowson belonged. And that 6 Jac. by indenture, he *covenanted to stand seised to the use of himself and his wife for their lives, and to the heirs of the said Richard; and after R. W. presents one Boynton, and dies, and his wife marries with Sir John Hall. The 1 June 6 Jac. [Hall] by deed grants proximam advocacionem to two, to this intent, that he might receive of such a parson, that he presented, all money as should be agreed between grantor and grantee; and that this was done, Boynton lying in extremis. And then the 26th Jan. 16 Jac. there was a corrupt agreement between Sir John Hall, and one of the grantees, that for 200l. to be paid by one Blundell a clerk, the other grantee should present him. And the 1st of February Blundell pays Sir Richard [John] the money, and the next day he was presented, instituted, and inducted accordingly, [so that it appertained to the king to present: the bishop pleads but as ordinary: Sir John Hall makes a title, and traverses the corrupt agreement. The incumbent pleads by protestation, that there was not any corrupt agreement, as was alleged; but answers not whether the money was paid or not; but said, that he is parson imparsonnee of the presentment of* But that 16 Jac. after such an agreement (scil.) 17 Feb. he was presented by the

[474] This case is according to the book with very little variation, but seems not clearly reported.

the letters patents of the king to this church, and never answers to the simony. And it was held by the Court to be naught, and only pleaded to hinder the execution before the justice of assise, if trial went against the patron. Hett. 99. Trin. 4 Car. C. B. *The King v. Canterbury Bishop.*

2. A simoniacal contract *must be averred*, and shewn specially, and shall not be so intended. See (E) pl. 6. Byrt v. Manning.

3. In case of simony the particular *sum* is not material. Arg. 2 Show. 3. Pasch. 30 Car. 2. B. R. in case of the King v. Johnson.

3 Lev. 16. The King v. the Archbishop of York and Sowton, S. C. adjudged accordingly, that the patron need not be named in this case, because his title is not in question, but admitted, and the king claims in affirmance of his title, and in his right, but for the offence of the defendant, and the patron shall not be put

4. Quare impedit by the king, on the statute of 31 Eliz. of simony, against L. the incumbent: defendant *pleads* in abatement, *that the very patron is not named*; and it was argued, that in all cases of a disturber, the parson or [and] patron ought to be named, and cited Hob. 320. 5 H. 7. 35. Smalb. 410. Hob. 316. 3 H. 4. 2. 22 Edw. 4. 44. 47 Edw. 3. 12. 7 Edw. 4. 44. and that authorities direct are Hob. 320. 42 Edw. 3. 7. 18 E. 3. 20. No patron ought to lose his right at common law without being heard; for though another may say as much, yet it is but reasonable to hear him; for the incumbent may confess the simony, &c. E contra it was said, all the reasons given are, that he may make his defence, but here he can have none to make; for the declaration charges not the patron, but only that the incumbent is a simoniack. North Ch. J. said, he need not be named, and Wyndham of the same opinion, where his right is concerned, he must be named, otherwise where it is not: and he cited Hall's case, 7 Rep. and Palmer's Rep. 207. Charleton J. said, it startled him, for that the patron ought to have a regard to his presentee, and defend him when he is in, and his work is not done by mere presentation. But Levinz was of opinion, that the plea is ill, and that the patron ought not to be named; and judgment was for the plaintiff. 2 Show. 167, 168. pl. 160. Mich. 33 Car. 2. B. R. *The King v. Sowton.*

out of possession by recovery in this action; and the patron has had the fruit of his presentment, but his clerk shall be removed for the simony, and therefore he need not be party; per North, Windham and Levins: but Charlton J. doubted; and respondeas ouster was awarded.

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3 Nelf. Abr. 244. pl. 20. cites the same report, viz. a Lutw. 1086. The King v. Gibson, and says, that upon demurrer, it was held, that where the right of the patron was not to be divested by the judg-

5. In a quare impedit, the plaintiff set forth the statute 31 Eliz. cap. 6. made against simony, and averred, that Thorndon was a *benefice with cure*, and that it being void, a *simoniacal agreement was made with the mother and guardian of the patron an infant*, and one Crew, that the infant should present the said Crew, and that, in consideration thereof, he should pay her the sum of 250l. &c. whereupon Crew was presented. The defendant pleaded in abatement, that he claimed nothing in the benefice, but upon the presentation of the infant J. W. who is not named in the writ: upon which there was a demurrer. The case was argued once for the plaintiff, and also for the defendant, and ordered to be argued again; but the Reporter says, he searched the prothonotary's books for several terms, but no mention was made of it after, [nor does any opinion of the judges appear]. 2 Lutw. 1086. 1089. Hill. 2 & 3 Jac. 2. *The King v. Gibson.*

6. It

ment, there he need not be named in the writ, now here was no complaint made against the patron; it was not he, but the simonist who was the disturber, and therefore the patron need not be made defendant. — See pl. 4. above.

6. It was urged, that in pleading a man to be a simonist, it is *necessary to shew some particular act of simony*, to which Holt Ch. J. agreed, because the word simony is not in the act, and therefore it is necessary to shew, &c. *to bring the person within the act.* Carth. 29. Arg. S. P.
Comb. 108. Pasch. 1 W. & M. B. R. in case of Betts v. Lowe.

(O) What Power the Ecclesiastical Court has in Simony.

1. **I**N a suit for tithes in the Spiritual Court, the plaintiff prayed a prohibition upon the 31st of Eliz. cap. 6. supposing that the defendant had committed simony in coming to the parsonage, and thereby the church was void, and the tithes not appertaining to him. But a prohibition was denied; for the simony might more aptly be tried in the Spiritual Court. Cro. C. 642. pl. 42. Mich. 40 & 41 Eliz. C. B. Risby v. Wentworth.

2. Simony *est studiosa voluntas emendi vel vendendi spirituali vel spiritualibus annexa*, and it is either *mentalialis vel conventualis*; and the Spiritual Court has a jurisdiction in both cases to proceed to examination on oath, either of the party or witnesses, but the Temporal Courts only have jurisdiction in the conventual simony; and therefore where simony is in allegation originally in the Ecclesiastical Court, the Temporal Court cannot prohibit the proceedings. Arg. by Doderidge solicitor; but Coke attorney e contra, because of the title of the king, which is examinable by the Temporal Court; et sic pendet. Mo. 777, 778. pl. 1077. Mich. 3 Jac. in the Exchequer. Close's case.

3. Where the Spiritual Court meddles only with simony *pro salute animæ*, it is well; but where they will examine a person upon an article which any ways draws the right and title of the benefice into question, a prohibition is to be granted. Per Coke Ch. J. 2 Bull. 182. Hill. 11 Jac. Sir Wm. Boyer v. the High Commission Court.

4. The Spiritual Court, by giving sentence against a simonist, does not oust him of his freehold, though it is a consequence of their sentence; and it being a matter which they have properly cognisance of, and which is not taken away by the statute 31 Eliz. cap. 6. which gives the Temporal Courts jurisdiction, the Temporal Court ought not to ravel into the grounds of their sentences, but to give credit to them, and to take him to be guilty of simony, who is deprived by the Spiritual Court for that offence. Freem. Rep. 84. pl. 103. Pasch. 1673. Philips v. Crawley. [476]

5. After a man is found no simonist in B. R. the Ecclesiastical Court

Court may very well examine the same matter. Arg. Comb. 73 Hill. 3 & 4 Jac. 2. B. R. in the case of Boyle v. Boyle.

For more of Simony in general, see Conditions, Presentation, Prohibition, and other proper Titles.

(A) Simul cum.

Le. 41. pl. 83. Mich. 28 & 29 Eliz. in the Exchequer. A writ of error was brought, and the same was assigned for error, and cited the case of a

H. 7. 16, 17. where a difference is taken, where the plaintiff declares, *that the defendant with one B. did the trespass, naming him in certain, and where the declaration is, that the defendant cum quibusdam aliis ignotis, &c.* and cites also 8 H. 5. 5. and all the justices of C. B. and barons of the Exchequer were clear of opinion, that by the common law the declaration was not good, for the reason, and upon the difference aforesaid; but if in trespass against one, who pleads that the trespass was done by himself and one B. to whom the plaintiff has released, and the plaintiff traverses the release; in that case, for as much as the matter does not appear upon the plaintiff's own shewing, but comes in on the part of the defendant, and not denied by him, the declaration is good enough. And it was further agreed by them all, that now this defect after verdict is helped by the statute of 18 Eliz. for it does not concern substance, but only form. And afterwards the first judgment was affirmed.

1. **I**N *trespass*, the plaintiff declared that the defendant *simul cum J. S. and another clausum suum fregit*; exception was taken, because it appears by the plaintiff's own shewing, that the trespass was done by the defendant, and another, and therefore the writ brought against one only was not good. But if it had been *simul cum aliis ignotis personis*, it had been good enough; whereas here the plaintiff has confessed another person trespassor with the defendant; and cited 2 H. 7. 15. 8 H. 5. 5. 14 H. 7. 22. But afterwards it was adjudged for the plaintiff. 3 Le. 77. pl. 116. Mich. 21 Eliz. Henry v. Brode.

2. Those in the *simul cum in battery* may be charged with the damages which are given against the chief defendant. Clayt. 37.

*[477] B. brings an action of trespass against M. simul cum, &c. and has a verdict against him. It was moved in arrest of judgment, that the ac-

Creswick's case.

3. One T. brings an action of *trespass and false imprisonment against J. S. simul cum aliis, &c.* The defendant pleads, not guilty, and a verdict is given against him for the plaintiff. It was moved in arrest of judgment, that the declaration was not good, because it declares against J. S. by name solely, and it ought to have been jointly against him with the others, naming them also; because the trespass was joint, and not against J. S. alone. But the Court held, that the declaration * was good; because it was with a *simul cum*, although the persons were not named;

named; and said, that this was the constant course of C. B. yet the judgment was stayed till the other should move. Sty. 15. Pasch. 23 Car. Tory's case. tion ought to have been brought particularly against the

other trespassers together with the defendant, and not against the defendant in particular, with a general simul cum against the rest, which is uncertain, and signifies nothing against the rest, and the rather, because the action is commenced by bill, and not by original; although it could not be good, though it were by original. But it was said by Roll. J. that it may be the plaintiff could not arrest the other trespassers, and that he will do it when he can, and that he may well proceed against them at divers times as he can take them; but that whensoever he shall have had satisfaction for the trespass done him from any one of them, he cannot proceed against any of the rest. And it was ruled, that judgment should be entered. Sty. 20. Pasch. 23 Car. Barker v. Martin.

Where a joint action of trespass doth lie against divers persons, of whom some can be arrested and others cannot, there the action may be brought against them that are arrested and do appear by their particular names, and against them that are not arrested with a simul cum A. B. C. D. &c. viz. To charge them that are arrested, but not the parties in a simul cum, any farther than only to take off their evidence at the trial. L. P. R. tit. Actions.

4. *Ejectione firmæ* against one simul cum has been ruled good, and so used in C. B. though heretofore it has been adjudged contrary; per Cur. Sty. 15. Pasch. 23 Car. B. R. in Tory's case.

5. Note, the parties in the simul cum must be all of them named in the writ and proved to be trespassers, otherwise their evidence will not be taken off, &c. but they may be sworn to give evidence for the defendant. L. P. R. tit. Actions.

6. A person named in the simul cum, being a material witness, was allowed to be struck out: and Keeling Ch. J. said, that if nothing was proved against him he might be a witness for the defendant. Mod. 11. pl. 33. Mich. 21 Car. 2. B. R. Anon. 6 Mod. 69. Mich. 2 Ann. B. R. Leonard v. Stacy, S. P. And per

Holt Ch. J. endeavours likewise must be used to take them, as process must be taken out against them.

7. If a man brings an original in trespass, and declares against him with a simul cum, he abates his own writ; but the defendant cannot take advantage of it without demanding oyer. If the writ be against two, the plaintiff may declare against one of them with a simul cum; per Holt. Comb. 260. Pasch. 6 W. & M. B. R. Billing v. Crossly.

For more of Simul cum in general, see Trespass, and other proper Titles.

Soil.

(A) *Who may meddle with the Soil, or to whom it belongs.*

[478] 1. **I**F one man has the land, and may plough and sow it, and cut and carry away the corn, and after when the corn is cut and carried away, another has it as his several, the other cannot meddle in the land but to plough it and sow it and to take the corn; and his beasts cannot feed in the land when he comes to sow it or to plough it or to carry away, but shall have no other profit but the corn only; and yet the franktenement was in him. Fitzh. Prescription, pl. 55. cites Temps, E. 1.

S. P. Br.
Nuisance,
pl. 22. cites
22 E. 3. 39.

2. If water runs between two seigniorics, of which the water and the entire spring belongs to the one lord, if this water by little and little carries away the soil of the seigniority to whom the water does not belong, and increases the soil of the other, so that the channel is removed out of its course upon the soil of the other seigniority in part or in all, yet the water and fountain belongs to the other seigniority which first had it, if the increase was so slow that a man could not perceive it, and which is by process of time in several years, unless certain bounds are put, by which a man may know it. Br. Encroachment, pl. 3. cites 22 Ass. 93.

S. P. Br.
Nuisance,
pl. 22. cites
22 E. 3. 39.

3. But of a hasty flood which does so, no man shall lose his soil, unless the river be an arm of the sea. Br. Encroachment, pl. 3. cites 22 Ass. 93.

S. P. Br.
Nuisance,
pl. 22. cites
22 E. 3. 39.

4. *Quære* if the soil be increased by an arm of the sea, if he shall lose his soil? It is said there by the Reporter, that he shall not. And every water that ebbs and flows is an arm of the sea so far as it flows. Br. Encroachment, pl. 3. cites 22 Ass. 93.

5. And Thorp said, that if a river be a high street and passage, which encroaches upon land of another, so that it changes its course, yet it is not in the power of the lord of the soil to stop it, or disturb men of the course and passage: quod adjudicatur in the Eyre of Nott.' Br. Encroachment, pl. 3. cites 22 Ass. 93.

6. Commoner may not meddle with the soil. Arg. Godb. 52. cites 15 H. 7. and 12 & 13 H. 8.

7. He that has warren in the land of another cannot meddle with the soil. Arg. Godb. 52. in the case of Dike v. Dunstan.

Properly,
unless other
matter be
shewn to
prove the

8. If one has the summer feeding of pasture, or the first tansure of meadow, or the sowing and reaping of corn upon arable, and another has the feeding separately at other times of the year, the law

law faith, that the soil is in him that hath the summer profits and corn; because it is the *greater profits*, and the other has but a profit apprender. Arg. Vent. 394. in the case of Potter v. North. contrary, the freehold is in him that has the * first tithing; for

that is the most beneficial part of the year. Gro. C. 862. Ward v. Pettifer.

* S. P. Hutt. 45. Mich. 18 Jac. Pit v. Chick, cites 15 E. 2. Fitzh. Prescription 51. and time of E. 1. Fitzh. Prescription 55.

9. But if two have interchangeably the sole feeding of pasture at such times that the interest of one is in all respects equal to that of the other, nothing can determine the soil to be in one more than the other; and therefore shall be in one for his time, and in the other for his time. Arg. Vent. 394. in the case of Potter v. North.

10. Indictment was for a riot, but the cause of the riot being the right of a private river, Holt Ch. J. said, if a river runs contiguously between the land of two persons, each of them is owner of that part of the river which is next his land of common right, and may let it to the other, or to a stranger. 12 Mod. 510. Pasch. 13 W. 3. B. R. The King v. Wharton & al.'

(B) What is incident to the Soil.

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1. IT is a maxim in law, that *quicquid plantatur solo, cedit solo*.

2. As the Bishop of Winchester grants to the mayor and commonalty of the same city, that they might edify in the vacant places of the same city, and inhabit there; and that grant was confirmed by the dean and chapter: and the opinion of Hutton was, that notwithstanding that grant the soil is to the bishop, and by consequence the houses, and that grant does not enure but as a covenant or licence, and not otherwise. Het. 57. Mich. 3 Car. C. B. Winchester Mayor and Commonalty's case.

3. So if a man be hung in chains upon my land, after the body is consumed I shall have the gibbet and chain. Said, upon a motion for a new trial. Per Holt Ch. J. Ld. Raym. Rep. 738. Mich. 10 W. 3. Spark v. Spicer. Salk. 648. pl. 18. S. C. but not S. P.

For more of Soil in general, see *Chimn, Grant* (S. 2), and other proper Titles.

(A) Soldier.

1. **P**ER Holt Ch. J. an *agent of a regiment* is but a servant of the colonel, and the receipt of the agent charges the colonel. There is no privity between the king, or the soldier, and the agent. Ld. Raym. Rep. 101. Mich. 8 W. 3. Beaumont v. Pine.

2. In *assumpsit* the plaintiff declared, that he was *captain* of a company of foot soldiers, and that J. S. in consideration the plaintiff would permit T. S. a soldier in his company, to be absent 10 days; J. S. assumed to the plaintiff to bring back the said T. S. or to pay the plaintiff 20l. The said T. S. did not return within the 10 days. It was objected that here was no consideration to maintain this action; or that the captain of a company has not any property in a soldier to *give him leave to absent himself* from the king's service. But per Cur. when the captain sees he has no occasion to use the soldier in the king's service, he may give him leave to be absent for some reasonable time, and such leave is a benefit to the soldier: and judgment was given for the plaintiff. Ld. Raym. Rep. 312. Hill. 9 W. 3. Taylor v. Jones.

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Carth. 417.
Trin. 9 W.
3. S. C. ac-
cordingly.
—4 Mod.
417. Hill.
10 W. 3.
B. R. S. C.
accord-

ingly.—Ld. Raym. Rep. 479. Trin. 11 W. 3. S. C. accordingly.

3. A *housekeeper* at Epsom, who let lodgings to persons coming thither, and dressed meat for such lodgers at so much per joint, and sold them small beer at 2d. per mug, and also found them stabling-room, hay, &c. for horses, at certain rates, is not an inn-keeper within the * statute 4 & 5 W. & M. cap. 13. for the *quartering of soldiers*. 1 Salk. 387. pl. 1. Trin. 11 W. 3. B. R. Parkhurst v. Foster.

4. It was moved to have one discharged upon the late act of parliament for disbanding the army, whereby soldiers are *exempted from suit for 3 years* upon affidavits. Per Holt, all we can do is to order *common bail*, but he must discharge himself of the action by *pleading the act, &c.* and *plaintiff may traverse his allegations*; and so was the rule. 12 Mod. 336. Mich. 11 W. 3. B. R. . . . and Crouch.

5. A *latitat* issued out of B. R. to the sheriff to arrest a man, and the *sheriff returned that the man was listed* according to the act of 4 & 5 Ann. cap. 10. Et ea occasione capere non possum. It was moved against the sheriff, that he ought to have arrested the man, because by the act the plaintiff had liberty to go on to judgment

judgment and execution against any thing but the defendant's body, and then the Court should discharge him on common bail, if he appeared to them to be listed regularly, but that the sheriff should not take upon him to determine whether he was regularly listed. But the Court upon consideration held it to be a good return, and that *this act worked by way of a supersedeas to any process* to be issued against persons listed, and that if the sheriff should arrest such a person, he *would be liable to an action of false imprisonment*. And they said it appeared, that the act did not intend that the man should be arrested, and then discharged on common bail, by the proviso that the plaintiff, upon leaving notice in writing at the defendant's last place of abode, or giving to the defendant such notice in writing of the plaintiff's cause of action, might file common bail for the defendant, and proceed to judgment, &c. That in case the man was not regularly and fairly listed, this was a false return, and the plaintiff had his remedy against the sheriff by action for the false return. 2 Ld. Raym. Rep. 1246. Easter 5 Ann. Sheriff of Middlesex's case.

6. A man being *excommunicated for non-payment of costs in a suit for tithes* in Court Christian, it was moved to discharge him, he being *in custody upon an excom. capiendo*, because he was listed a soldier according to the act of parliament, which says, *if any person being in custody upon any process, &c.* The Court did not discharge him upon this motion; but after it being moved again, Holt Ch. J. said, since the judges of C. B. are of opinion, that a man *in execution* shall be discharged, being listed as a soldier, that a man in execution on an excom. capiendo, is within the same reason; and therefore by the Court he was discharged. 11 Mod. 191. Mich. 7 Ann. B. R. Anon.

But where a judgment was had against a defendant, and after judgment obtained he voluntarily listed himself a soldier, and after the said listing he was

taken in execution by virtue of a *capias ad satisfaciendum* upon that judgment; and a motion was, that he might be discharged according to the late act of parliament, which says, *that any person that voluntarily lists himself a soldier, shall not be taken out of her majesty's service by any process whatsoever*. But per Cur. the motion was denied; for the words *any process*, must be intended only of a *mesne process*, and not be extended to *execution*; for that would be hard upon creditors, and put them sans remedy; wherefore the defendant was not discharged. 11 Mod. 252. Mich. 8 Ann. B. R. Mason v. Vowson.

7. A motion was made to discharge one, who was a prisoner, upon the act of parliament for listing. The case was, there was a trial, and *after verdict for the plaintiff* the defendant listed himself; and Huck's case was cited, where one was discharged upon an excom. capiendo, he being so inlisted. *Holt Ch. J. said, he was never of opinion that executions were within the act, though the judges of C. B. were of that opinion; but there appearing to be *fraud* in this case, the defendant could not be discharged, though it had been upon a *mesne process*, much less on an execution. 11 Mod. 234. Trin. 8 Ann. B. R. Mascall v. Davys.

*S. P. Per Holt Ch. J. 11 Mod. 191. Anon.

8. It was moved to discharge one upon common bail upon the listing act. The case was, one was listed into the queen's service, served some time, and afterwards was discharged upon his finding another able-bodied man, who is now in the army. The question was, whether the clause in the act, *or finding another able-bodied man,*

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man, shall refer to the time of his lifting before a justice of the peace? or whether any time afterwards will do, provided the man, whom he finds, continues in the service. The Court were of opinion that the latter was sufficient, and thereupon the man was discharged. 11 Mod. 235. Trin. 8 Ann. B. R. Anon.

9. A man puts in *special bail* to an action, and the plaintiff had judgment against the defendant *by default*; the bail surrendered the defendant; it was moved to discharge the defendant, because he had listed himself a soldier after the bail put in, and before the judgment; but refused per Cur. 2 Vern. 697. Trin. 1715. cites it as the case of Grumby v. Smith.

10. A *gunner* was such a soldier as was privileged from arrests for Debt. 10 Mod. 346. Mich. 3 Geo. B. R. Johnson v. Louth.

11. So a *trooper* was, Per Cur. 10 Mod. 347. in case of Johnson v. Louth.

12. Upon affidavit, that the defendant in *ejectment* was a soldier, and consequently a privileged person, he was ordered to give security for the future payment of his rent. 10 Mod. 383. Hill. 3 Geo. 1. Smith v. Parks.

Rep. of
Pract. in
C. B. 77, 78.
S. C. ac-
cordingly.

13. The defendant was an *out-pensioner of Chelsea College*; and the question was, whether or no he was intitled to the benefit of the act of parliament as a soldier in his majesty's service? The Court held, that he was not; being under no military discipline, and subject only to the control of the commissioners. Barnes's Notes in C. B. 307. Mich. 6 Geo. 2. Bowler v. Owens.

Rep. of
Pract. in
C. B. 89.
S. C. ac-
cordingly;
and in a
note at the
end of the
case is cited
the case of
Bilson v.
Smith.—
And Ibid.
says, that
since, by
the statute
of 13 Geo. 2.

14. The plaintiff brought an *action* against the defendant, who was a soldier, for a debt under 10l. and recovered judgment for 14l. 10s. damages and costs, and afterwards brought an action of debt upon the judgment, and held the defendant to bail; who moved to be discharged upon a common appearance, being a soldier, and the debt for which he was originally sued being under 10l. The Court were of opinion, that the debt which they were to consider was the sum recovered by the judgment, and that the defendant must be held to bail. The same point was determined upon consideration, and looking into the Soldiers' Act, in Hill. 5 Geo. 2. between BILSON and SMITH. Barnes's Notes in C. B. 307, 308. Easter, 6 Geo. 2. Nichols and others v. Wilder.

for preventing mutiny and desertion, the original debt must be 10l.—So where the defendant, a soldier in the king's service, was arrested and held to bail in an action of debt upon a judgment, and moved to set aside the bail-bond, the original debt being only 3l. 3s. though the damages and costs recovered did amount to more than 10l. the Court considered the words of the clause in favour of soldiers in the last and other acts for punishing mutiny, &c. and were of opinion, that the original sum due in this action is the sum recovered by the judgment. A debt on judgment cannot be considered as a debt of a less nature than a simple contract; and the rule to shew cause why the bail-bond should not be set aside, was discharged. Barnes's Notes in C. B. 308. Trin. 11 & 12 Geo. 2. Savage v. Monk.

For more of **Soldiers** in general, see the several Acts of Parliament made relating to them, which would be too prolix to insert here; and see the several proper Titles in this Work.

Solicitor.

Solicitor.

(A) *What Act of his shall bind the Client.*

1. **T**HOUGH a solicitor's *assent* to interlocutory orders is binding, yet it cannot bind to a reference finally to determine; and therefore a decree founded upon such assent, and the same appearing upon the decree, was reversed. Chan. Cases 86. Pasch. 19 Car. 2. Colwel v. Child.

Chan. Rep.
195. S. C.
accord-
ingly.

2. The plaintiff having a *decree for money*, the plaintiff's solicitor, without any order from the plaintiff, *receives the money*. The plaintiff knowing nothing of it, prosecuted again. On complaint the solicitor was ordered to pay back the money, with interest, costs, and charges. But as to the plaintiff, the Lord Chancellor allowed the payment good; and bid the plaintiff, if he would, take his remedy against this solicitor. 2 Chan. Cases 38. Trin. 32 Car. 2. Anon.

(B) *Examined against his Client. In what Cases.*

1. **T**HOMAS HAWTRY, gent. was served with a *subpœna to testify his knowledge touching the cause in variance*; and made oath, that he has been, and yet is a solicitor in this suit, and has received several fees of the defendant; which being informed to the Master of the Rolls, it was ordered, that the said Thomas Hawtry shall not be compelled to be deposed touching the same, and that he shall be in no danger of any contempt touching the not executing of the said process. Cary's Rep. 88. cites 19 Eliz. Bird v. Lovelace.

S.P. Cary's
Rep. 89.
cites 19 & 20
Eliz. Anstey
v. Vesey.—
S. P. Ibid.
Hartford v.
Lee & Alice.

2. The *solicitor* of the plaintiff was ordered to be examined upon any interrogatory which should *not be touching the secrecy of the title, or of any other matter which he knew as solicitor only*. Cary's Rep. 126, 127. cites 27 Eliz. Kelway v. Kelway.

3. Upon a trial at bar, one who had been solicitor for the now defendant, was produced as a witness concerning the *razure of a clause in a will*, supposed to be done by the defendant. The Court were moved, whether he could be examined touching this, because having been retained his solicitor, he should by reason of that be obliged to keep his secrets; but it appearing, that B. had *made this discovery to him* (of which he was now about to give evidence) *before such time as he had retained him*, the Court were

3 Chan.
Rep. 66, 67.
S. C. That
it was a de-
vise of an
estate for
99 years,
and after
the word
(years) was
a razure,

where was thought to have been written (if he so long live); and

that the solicitor demurred, for that he knew nothing but as solicitor for the defendant, and as entrusted by him. But the Court over-ruled the demurrer, and afterwards upon appeal to the Lord Keeper, the order was confirmed.——Nell. Chan. Rep. 181. S. C. and seems a transcript of the former.

of opinion, that he might be * sworn. Otherwise, if he had been retained his solicitor before. The same law of an attorney or counsel. Vent. 197. Pasch. 24 Car. 2. B. R. Cuts v. Pickering.

4. It is against the duty of a counsellor or solicitor, &c. to *discover the evidence* which he who retains him acquaints him with; per Hale. Vent. 197. obiter, in the case of Jones v. the Countess of Manchester.

(C) *What shall be said Maintenance in him.*

1. **A** SOLICITOR of an *inferior rank*, that solicits causes for his clients may take recompence, and take a promise to pay what sums he shall lay out; but if a person of a superior rank should do it, it were maintenance. Cro. C. 160. in the case of Thursby v. Warren, and cited 39 Eliz.

2. A solicitor may not *lay out money* for his client. Wich. 53. in the case of Gage v. Johnson, cites the case of Samuel Leech.

3. Relief was prayed against a *bond* entered into to a solicitor to pay 100l. when a *verdict* should be recovered by him on the behalf of J. S. But the Master of the Rolls said, he saw no cause in equity to relieve against the penalty and interest of the said bond. And the cause coming afterwards to a rehearing before the Lord Chancellor, assisted by Ld. Ch. J. Hale, they were of the same opinion, and confirmed the decree. 2 Chan. Rep. 21. 20 Car. 2. Dixon v. Read.

(D) *Charged in Default of the Plaintiff his Client.*

1. **A** WAS bail for J. S. in an action at law, and then filed a bill in Chancery in the name of J. S. and prosecuted it, J. S. being absent, and not to be found. Throughout the whole proceedings in Chancery A. acted as solicitor. It was ordered by the Lord Chancellor, upon a motion, that A. the solicitor should pay the costs of the defendant here (the plaintiff at law). Upon this matter having been formerly moved before the Master of the Rolls, as to the solicitor's paying costs, he desired to see precedents before he made any order; but declared, that if there were any one precedent he would make a second. Chan. Cases 71. Hill. 17. & 18 Car. 2. Digardine v. Swift.

2. A solicitor filed a bill, omitting material parties, and after, by order of Court, amended the bill and inserted the others, and charged them in a proper manner, but the prayer of process was only

only against the first defendant; upon which the defendant put in the same plea to the amended bill as he had before done to the original bill, viz. that the others ought to be made parties. And the Lord Chancellor held the plea good; for that without praying process against them, they are still not defendants. But the solicitor being in Court pretended that the record was right, which appeared after not to be so; and the plaintiff being a poor man and in prison, and this seeming to be the gross neglect of the solicitor, the plea was allowed, and the bill thereupon amended; but the costs were ordered to be paid by the solicitor. Wms.'s Rep. 593. Mich. 1719. Fawkes v. Pratt. [484]

(E) Disputes between Client, &c. and Solicitor.

1. **D**EBT lies not for money for soliciting, it not being a certain duty, but is to be recovered by *action on the case*. Vaugh. 99. in the case of Edgcomb v. Dee, cites it as the case of Germain v. Rolls, in Cro. E. 459. pl. 4.

2. A solicitor brought a bill in Chancery for his fees, defendant pleaded 3 Jac. cap. 6. [7] that the plaintiff had not signed his bill, and the plea was allowed. Vern. R. 312. pl. 309. Hill. 1684. Norris v. Bacon.

3. The defendant in this case being advised he had paid one Nailor, who was his solicitor in this cause, more money than could be due to him, obtained an order to have his bills referred and taxed, which was done; and upon the taxation he was reported to be over-paid 60*l*. Thereupon he moved the Court for a *ne exeat regnum* against Nailor, on affidavit that he was going beyond sea with my Lord Cornbury, the Governor of Jamaica; and the writ was granted by the Master of the Rolls in the absence of my Lord Keeper, though there was no bill in Court whereon to ground this writ. Chan. Prec. 171. Mich. 1701. Loyd v. Cardy.

4. A. a client in the country, employed a country solicitor in a Chancery cause, and the solicitor employed E. as clerk in Court; A. paid his solicitor a very large sum of money, but E's bill was unpaid. Lord C. King held, that the credit given by the clerk in Court was to the solicitor only; so that the client by paying his solicitor is discharged, and would not decree A. to pay the same debt twice; and that all he could do for E. was to take no papers out of his hands till paid, and if any thing remained due from A. he would stop it, and it should be paid to E. And there being some proof of A.'s retaining E. to take care of his cause, it was directed to be tried in an action at law to be brought by E. against A. the client. 2 Wms.'s Rep. 460. Pasch. 1728. Farewell v. Coker.

4. Morgan was concerned as solicitor for Wilson. An order was obtained, that his bill of costs should be taxed, and that Wilson should pay him the money that should be found to be due to him on such taxation: In this order there was the usual clause, that
be

he should be examined on interrogatories. After this order was made M. was under prosecution for forgery, and absconded on that account; but he assigned the benefit of his bill of costs to H. for a valuable consideration. A petition was now preferred to the Court by H. praying, that he might be allowed to stand in the place of M. and that the money due in this bill of costs might be paid him. Lord Chancellor was of opinion that he ought to be allowed to stand in the place of Morgan, but inclined to think that he could have no order for the payment of any part of this bill of costs till he could get M. to be examined on interrogatories. Barnard. Chan. Rep. 263, 264. 1740. Wilson v. Williams.

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6. A. a plaintiff employed B. a solicitor, who employed S. a clerk in Court; S. obtained an order for taxing the bill of costs due to him from B. On such taxation a very small sum was taken off his bill; thereupon S. obtained another order for payment of the costs incurred by such taxation, and prosecuted B. to a commission of rebellion, in order to get the money due from him; but being not likely to recover any thing from him, he preferred a petition to the Court, praying, among other things, that he might detain A.'s papers, which he had in his hands, not only till the costs were paid him which were reported to be due by the first order, but till those costs were paid likewise which were incurred by the former taxation. Lord Chancellor was of opinion, that S. was intitled to detain the papers of A. till those costs were paid him which were reported to be due to him by the first order, but not till the remaining part of the costs were paid him which were incurred by the taxation. Barnard. Chan. Rep. 264, 265. Mich. 1740. Cockerel v.

7. Where the bill of costs of a solicitor shall not be ordered to be re-taxed, by reason that nobody will undertake to pay the costs which shall appear to be due on such re-taxation. See Barnard. Chan. Rep. 266. Mich. 1740. Murfy v. Balderston.

But he must serve his client with the order for taxing his bill of

8. When a solicitor's bill of costs is taxed, he may take out an attachment for them without first of all taking out a subpœna for his costs. See Barnard. Chan. Rep. 266. Mich. 1740. Murfy v. Balderston.

costs, and with the master's report, whereby such costs are ascertained before he can take out any attachment for them. Barnard. Chan. Rep. 266. Mich. 1740. Murfy v. Balderston.

For more of Solicitor in general, see Attorney, Maintenance, and other proper Titles.

South Sea.

(A) South Sea Directors.

1. 7 Geo. 1. **D**ISABLING the then South Sea Directors, *One of the said directors, to whom a certain allowance was made,*
cap. 27. enacted, that every director, &c. should have out of their several particular estates such allowance for subsistence of him and his family, as in a schedule annexed, upon certain conditions therein specified.

was afterwards sued at law for monies received by him for the plaintiff's use, it being received to be applied to a particular purpose, which it was not. The plaintiff recovered at law, whereupon the defendant brought his bill, and moved for an injunction, urging that the late act having vested all his estate in trustees of the South Sea Company, and made a provision for payment of his debts out of his estate, the plaintiff at law ought to repair to the trustees. But Lord C. Parker denied an injunction. Wms.'s Rep. 695. Pasch. 1721. Holditch v. Miff.

2. Judgment was obtained against a South Sea Director for 1000l. and by the statute 7 Geo. 1. cap. 5. it is enacted, that every director, &c. shall deliver on oath before one of the barons of the Exchequer, before 25 March 1721, two inventories of all the real and personal estate of which he was possessed or intitled unto in his own right, or of any other person in trust for him, &c. which shall discharge him from the demands of all other persons; all which estates shall be forfeited and recovered by virtue of that act, and shall be paid into the Exchequer, and applied for the benefit of the South Sea Company. It was moved, for the opinion of the Court, whether the defendant could avoid this judgment, upon his own affidavit that he gave in a true inventory pursuant to the act. Per Curiam, all that is required in this case by the statute, is to give an exact and true inventory, and he swears that he gave an inventory pursuant to the act, so need not name all the particulars; and it is absolutely necessary that his evidence should be taken, because he best knows whether the inventory was true or not; so the judgment against him was vacated. 8 Mod. 291. Trin. 10 Geo. 1725. Saladine v. Sir Jacob Jacobson.

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(B) South Sea Subscriptions. Cases relating thereto.

1. **T**HE husband before marriage assigned to the intended wife's trustees 200l. Exchequer annuities for her jointure, and covenanted for himself and his heirs to make good these annuities to her;

her; he died, and his *executors subscribed them* into the South Sea, *without the privity of the wife*, who was then in the country, *but upon notice thereof*, when the company was in prosperity, *insisted on a proportion of the benefit* of that subscription. Lord C. Macclesfield held the wife to be bound by the subscription, it being done by the executors who had the legal estate, and the *assignment was not registered in the Exchequer*, and consequently void; and so this subscription by the executors was to be considered of equal force as one made by guardians, which would bind an infant; but then it being without the widow's consent, it should be made good out of the testator's personal estate, and if that proved deficient out of his real estate, by reason of the covenant; and as to her having insisted on a proportion of the benefit, his lordship said that looked like loose discourse, and thought it not sufficient reason to deprive her of what was stipulated for on her marriage. His lordship admitted that there was a clause in the *
 * 6 Geo. 1. cap. 4. S. 23. act of parliament for making good all subscriptions made by trustees, executors, or guardians; but he said that this was for the benefit, quiet, and security of the South Sea Company, which this decree would not break into. And he said that the widow did not seem to have had any means of compelling the executors to let her into the benefit of the subscription of these annuities, if any had been. And ordered the widow to have her costs out of the husband's assets. 2 Wms.'s Rep. 82. 85. Mich. 1722. Powell v. Hankey and Cox.

2. *Lottery tickets payable to the bearer, were left with a banker for safe custody, and were by him subscribed into the South Sea*; the proprietor brought a bill against the goldsmith, and the Master of the Rolls dismissed it; for that it was a hard case that the goldsmith, who was but a trustee, should suffer for doing what was then thought for the best; and if the plaintiff was wronged he was at liberty to take his remedy at law. Cited by the Master of the Rolls, Trin. 1723. as decreed by himself about a year before, when he sat at Westminster for the Lord Chancellor. And the Court had the greater regard to this decree, forasmuch as the parties acquiesced under it, and brought no appeal. 2 Wms.'s Rep. 169. in the case of Trenchard & Ippley v. Wanley, cites it as the case of Bluck v. Nichols.

3. A gentlewoman having money in a goldsmith's hands, and his note for it, her brother wrote to the goldsmith to invest the money in lottery orders, but giving no direction in whose name to do it, the *goldsmith took the orders in his own*, and afterwards, without any further orders, he *subscribed the lottery orders with others of his own* and other customers into the South Sea, but
 [487] *gave no notice till 2 months after the subscription made*. The Master of the Rolls thought, that by the words of the act of 6 Geo. 1. cap. 4. S. 23. *impowering trustees, guardians, executors, and administrators, to subscribe lottery orders into the South Sea*, though the cestui que trust had expressly forbid the trustee to subscribe, yet by virtue of the express authority give. to trustees, &c. to subscribe (in which every man's consent is included, notwithstanding

standing such prohibition), the subscription would be good, and the trustees justified; and that from the time of his taking the orders in his own name, he became a trustee, and dismissed the bill with costs. 2 Wms.'s Rep. 166. Trin. 1723. Trenchard and Ipplesley v. Wanley.

For more of South Sea in general, see Stocks, and other proper Titles.

Specialty.

(A) What shall be said a Specialty.

1. **D**EBT against executors upon a tally sealed, having words, which testified that the testator had put his seal to pay 20l. at certain days, and two scores were in the tally; Skrene demurred, inasmuch as it is not a sufficient specialty which shall charge executors. Hull asked what sum the scores pretended? Norton said, every one 10l. Skrene said the writing may be erased out by water or other engine, and the scores may be changed and made greater; by which it was awarded per Cur. that the plaintiff take nothing by his writ. Br. Taile de Exchequer, pl. 6. cites 12 H. 4. 23.

2. Policies and bills of exchange are sacred things; though neither of them are specialties, yet they are of great credit, and much for the support, conveniency, and advantage of trade. Per Pemberton Ch. J. Skin. 54, 55. in case of Kaines and Sir Robert Knightly.

3. 1500l. of the woman's, and 500l. of the intended husband's, being 2000l. was agreed by marriage articles to be invested within a certain time in lands, to be settled on the husband and wife for their lives, remainder to the heirs of the body of the wife by the husband, remainder to the heirs of the husband. The husband received the whole 2000l. The wife died, leaving a son and 3 daughters; then the father died intestate, no land being purchased. The eldest daughter took out administration; the son brought a bill against his sister (the administratrix) to have the money without laying the same out in a settlement, which was decreed; but then it was objected, that this was not a debt by specialty from the intestate,

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intestate, but only by simple contract, there being *no express contract from the intestate by the articles to pay it*; so that it was at most but a breach of trust, as money received and misapplied. But Sir John Trevor said, that it is a debt by specialty, and to be paid in that degree; for it is agreed by the articles (to which the husband was party) that within such a time it shall be laid out in land, and he having received it and not laid it out, has broken that agreement; and an *agreement under hand and seal* is a covenant, and consequently a specialty. Wms.'s Rep. 130. Mich. 1710. Benson v. Benson.

4. *A. and B. were trustees; B. received 400l. of trust money, for which he gave a receipt, and by writing under his hand and seal declared that A. the other trustee had received no part of the 400l. but that himself had received the whole; B. died intestate, having never placed out the 400l. according to the trust, but having kept it in his hands till his death.* This was held by the Master of the Rolls to be a specialty debt; and upon the cause coming on before the Ld. Chancellor Talbot, it was insisted that an acknowledgment, though without the words *teneri et firmiter obligari*, if under hand and seal, will create a specialty debt, because under hand and seal; and to prove it were cited Dy. 20. 2. Ro. Ab. 597. Bro. Dette 187. Cro. Eliz. 644. Ld. Chancellor said, that this without doubt is to be considered as a specialty debt, there being *no other definition of such a debt but that it is under seal*, and that the cases, which have been cited, prove it. Sel. Cases in Chan. in Lord Talbot's Time 109, 110. Trin. 1735. Gifford v. Manley.

For more of Specialty in general, see Executors, Heirs, and other proper Titles.

Spoliation.

(A) Lies. In what Cases, and what is Spoliation.

* S. P. For then the right of patronage comes in

I. **I**F two incumbents are, and the one clerk is in by one patron, and the other by another patron, spoliation does * not lie, but where both clerks are in by one and the same patron, or by means of one

one and the same patron, there lies spoliation, and otherwise not. *Br. Consultation*, pl. 1. cites 44 E. 3. 33. debate, and for this there lies
 prohibition, and no consultation. *Br. Spoliation*, pl. 4. cites 38 H. 6. 19. — *S. P.* But Affise or trespass lies at common law; quod nota. *Br. Spoliation*, pl. 1. cites 26 H. 8. 3.

2. Where an abbot leases his advowson where he is parson im-
parsonage, and the lessee presents the vicar of the same church to the
parsonage, and by licence of the bishop makes thereof an union, which
 continues seven years, the abbot shall not have spoliation, and it
 seems to be good law; for the vicar is only an usurper. And
 does not gain the incumbency of the parsonage, and then against
 trespassor or usurper lies trespass, and not spoliation in the Spiritual
 Court. *Br. Spoliation*, pl. 2. cites 44 E. 3. 33. Br. Consul-
 tation, pl. 1.
 cites S. C.
 And by
 Knivet, by
 the conti-
 nuance for
 so long a
 time the
 patronage
 is discon-

tinued till it be recontinued by action of right of advowson, which does not lie in Court Spiritual,
 and therefore denied a consultation, but bid them sue a writ of right. — *Br. Spoliation*, pl. 6.
 cites S. C. — *Br. Presentation*, pl. 5. cites S. C. That the abbot shall not have consultation
 in the Spiritual Court, but shall not be put to his writ of right by suffering of the long possession.
 But Brook says, quod mirum! because, it seems he remains incumbent notwithstanding the pre-
 sentment and union, and so may have trespass at common law. — *S. P. F. N. B.* 37. (A).

3. If presentee of the king ousts the incumbent of another without [489]
induction by the bishop, this is spoliation. *Br. Spoliation*, pl. 3. But if it be
 by induction
 of the
 cites 8 H. 4. 21. per Gasc. and Hulf.

bishop, he shall sue to the king by petition to try the right, and by scire facias against the presentee.
Br. Spoliation, pl. 3. cites 8 H. 4. 21. per Gasc. and Hulf.

4. He who presents himself by a strange name where he is patron,
 and priest, he shall be put out for spoliation; for he may pray the
 ordinary to admit him, but not present himself. *Br. Quare Im-*
pedit, pl. 18. cites 35 H. 6. 59.

5. A clerk had a collation by the king unto a chapel, and was put
 into possession by the sheriff, and afterwards the clerk was ousted by a
 prior, &c. in that case he shall not have a spoliation, but an affise
 or trespass, &c. *F. N. B.* 37. (D).

6. If one clerk without any presentation, institution, or induction,
 casts another parson out of his rectory, and takes the profits thereof,
 the parson shall not have a spoliation against him, but an action of
 trespass, or an affise of novel disseisin; for spoliation lies against him
 only who comes to the possession of a benefice, or unto the fruits
 thereof, by the course of the spiritual law, viz. by institution, &c.
 so that he have colour to have it, and to be parson by the spiritual
 law. *F. N. B.* 36. (I).

7. So if a prebend happen void, and the bishop collates there-
 unto, and before induction the bishop dies, and the temporalities
 come unto the king, and afterwards he is inducted; and after-
 wards the king gives the same by his letters patents to another clerk,
 who is instituted and inducted, the first clerk shall have a spolia-
 tion in the Spiritual Court against the presentee of the king; be-
 cause the king ought to have removed him by quare impedit, and not
 to have collated as he did: and there the patronage does come in
 debate. *F. N. B.* 36. (K).

(B) Lies. For whom.

1. **A** MAN shall not maintain spoliation without being first induced, and yet it is said, that the induction is not traversable, quod quære inde: but he shall have fruits and profits by the admission and institution, and before induction. Br. Spoliation, pl. 7. cites 33 H. 6. 24.

2. Spoliation was sued in the Spiritual Court by the abbot, because he and his predecessors have been seised of the advowson of B. with the tithes thereof, and have held it in proper use time out of mind, and that the two have taken tithes and spoiled him out of the church; the defendant said, that J. S. was seised of the advowson in right of his feme, and the ancestor of the feme before him; and that the baron presented the one defendant who was in, and after resigned, by which the baron presented the other defendant, who took the profits each for his time, and that the advowson was never appropriated by the feme nor her ancestor, and prayed judgment if the Spiritual Court will take consueance; and the defendants had upon this a prohibition, and the plaintiff prayed consultation, and could not have it. Br. Spoliation, pl. 4. cites 38 H. 6. 19.

3. A parson imparsonnee may have spoliation as incumbent, and writ of right of advowson as patron; per Yelverton. Br. Spoliation, pl. 4. cites 38 H. 6. 19.

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As where
the pope
licenses one

4. Spoliation does not lie, but where one incumbent ejects another, and the right of advowson does not come in debate. Br. Spoliation, pl. 4. cites 38 H. 6. 19.

who is created a bishop to retain his ancient benefices, and the patron presents another, and the eldest incumbent sues spoliation in the Spiritual Court, this lies well; for both clerks are by one patron, and the right of the patronage nor of the advowson shall not come in debate; but the debate is, if the church be void or not. Br. Spoliation, pl. 4. cites 38 H. 6. 19.—S. P. F. N. B. 36. (A).

So where my incumbent takes another benefice by licence of plurality, and I present another, who enters, and the eldest incumbent sues spoliation in the Spiritual Court, it lies well for the cause above. Br. Spoliation, pl. 4. cites 38 H. 6. 19.—One of them may sue a spoliation against the other, and then it shall come in debate, whether he has plurality or not. F. N. B. 35. (H) cites 38 H. 6. 20.

So of deprivation. Br. Spoliation, pl. 4. cites 38 H. 6. 19.

So where one surmises to me that my clerk is dead, and I present another, the first incumbent who is in may have spoliation, all which as aforesaid was granted by all; for in this case the right of advowson does not come in debate; and that neither way parson imparsonnee cannot have spoliation; for if the incumbent be presented by the abbot, and admitted after the appropriation, by this the appropriation is determined for ever, and then the abbot has no colour as incumbent, and then trespass or assise lies, and not spoliation. Br. Spoliation, pl. 4. cites 38 H. 6. 19.

S. P. F. N. B. 87. (B). But claims who is parson imparsonnee, then spoliation does not lie; for then the right of advowson is in debate. Br. Spoliation, pl. 4. cites 38 H. 6. 19.

F. N. B. 36.

(H) S. P. And therefore if one of them sues a spoliation, the other shall have a prohibition, and no consultation shall be granted.—But if the tithes or profit amount to the fourth part of the

the church, then one parson shall not have spoliation against another parson, if they claim not of one patronage, so that the title of the patronage does not come in debate; and then he shall have spoliation; and if the other sue a prohibition, &c. he shall have a consultation. F. N. B. 37. (E)

For more of Spoliation in general, see Prohibition, and other proper Titles.

(A) Stamp Act.

1. **B**y the statute of 9 & 10 W. 3. cap. 25. for granting further duties upon stamp vellum, &c. Sect. 27. For every piece of vellum, &c. upon which any admission into any corporation, &c. shall be written, 1s. shall be paid. And S. 59. The commissioners are required to stamp, &c. And afterwards, by that clause, it is enacted, if any instrument or writing by that act intended to be stamped, shall, contrary to the intent thereof, be written or ingrossed by any person whatsoever (not being a known clerk or officer, who in respect of any publick office or employment is or shall be intitled to the making, writing or ingrossing the same), upon parchment or paper not stamped according to that act, then there shall be paid to his majesty, &c. over and above the duty aforesaid for every such instrument or writing, 10l. and that no such instrument or writing shall be pleaded or given in evidence in any Court, or admitted in any Court to be good or available in law or equity, until as well the said duty as 10l. should be paid to the king, &c. and a receipt produced for the same.

In an information against one who claimed and exercised the office of a burges of a borough, he, in order to prove his being sworn and admitted 19th Decemb. 1721. produced an instrument in parchment, purporting the swearing

and admitting on that day five burgeses, of which the defendant was one, but not named the first in the said instrument, but the third, two others being named before him. It was proved to be signed by the burgeses then present, but it was stamped only with one stamp. Upon which Mr. Attorney General for the king objected, that this is no proof of the swearing and admitting of the defendant (both which it was incumbent upon him to prove) nor could be admitted to be read in evidence; for by the statute this instrument, being an admission of five persons to be burgeses, ought to have five stamps; that it could be good for none for the uncertainty, or at most it could be good but for one, but that could not be for the defendant; for if it was good for any, it must be for the first named; but the defendant was the third named, and therefore it could not be for him. And of this opinion were Raymond Ch. J. and Fortescue and Reynolds J. after having heard what the counsel for the defendant could say. But then they offered in evidence four other distinct pieces of parchment, dated the same 19th of December 1721, each of them being duly stamped, which imported the several admissions and swearings of the four burgeses last named in the other parchment, and one of them the particular swearing and admission of the defendant. But then it was proved, by the witness who produced these pieces of parchment, that the entries were not made upon them, nor were any of them stamped till near two months after the 19th of December 1721, nor were any of them signed by the burgeses that elected and were to admit the defendant. But the same judges were clear of opinion, that this instrument was no evidence, nor could be admitted as such, to prove the defendant was admitted and sworn the 19th of December 1721, for it appears it was not entered upon, nor the parchment stamped till a month after; and by the act the admission is to be on paper or parchment stamped

at the time, otherwise it is not to be given in evidence till the penalty is paid, and certificate thereof produced. 2 Ld. Raym. Rep. 1445, 1446. Mich. 13 Geo. The King v. Recks.

+ The Court said it could not be given in evidence by reason of the said statute. But if the penalty be paid, and a receipt taken from the Stamp Office be produced in evidence, it is very allowable. Barnard. Rep. in B. R. 8 Mich. 13 Geo. 1. S. C. by name of the King v. Rich.——Ibid. The Court said, that the same point was determined in the case of Dr. Gaffill Bishop of Chester v. Peploe.

2. A warrant of attorney for entering up a judgment was written on a paper, which *likewise contained a bond*, and had only *one stamp*, whereas it ought to have two. It was moved that judgment and execution might be set aside for this reason. But per Cur. there may be reason to refuse such a warrant of attorney in evidence, but no reason to make all void; for there is nothing in the act that imports that. 2 Salk. 612. pl. 5. Mich. 4 Ann. B. R. Anon.

3. A motion was made to *set aside two verdicts*, because the *distringas's were not stamped*, so that the trials were void by the stamp act; but the solicitor getting the writs stamped before the *postea* was brought into Court, the motion was rejected; for it did not appear to them but that they were stamped, and they could take no notice whether they were stamped or not at the assises. If they were not, then the defendant should have took notice, and insisted on it at that time. 8 Mod. 226. Hill. 10 Geo. 1724. Anon.

4. The stamp act *is only to secure the duty to the crown*, and not to take away any evidence from the parties. 8 Mod. 361. Pasch. 11 Geo. The King v. the Bishop of Chester.

5. It is every day's practice, that *upon payment of the duty and penalty the writing is made good*. 8 Mod. 365. The King v. the Bishop of Chester.

6. The 3d and 4th of W. & M. says, that apprentices bound by indenture shall be intitled to a settlement. An *indenture of apprenticeship* was not stamped; the Court held, that this indenture not being stamped is *as no indenture*. Gibb. 167. 4 Geo. 2. B. R. Anon.

For more of Stamp Act in general, see the Statutes themselves, and proper Titles in this Work.

* Statutes.

(A) What shall be a good Act of Parliament. [In respect of the Manner.]

[1. † SEE for this Hobart's Reports, 151. between the King and the Lord *Hunsdon* against the Countess Dowager of *Arundel* and Lord *Howard*.]

were *ingrossed upon parchment and bundled up* together, with a writ in the king's name, under the great seal, to the sheriff of every county, sometimes in Latin and sometimes in French, to command the sheriff to proclaim the said statutes within his *bailiwick*, as well within liberties as without. And this was the course of parliamentary proceeding before printing came in use in *England*, and yet continued after we had the print, till the reign of H. 7. 12 Rep. 57. Anno 23 Eliz. in the case of heresy.——The way about the beginning of E. 3. was to send them to the sheriffs of counties to have them *proclaimed*, and afterwards they were inrolled in the general Courts in Westminster. There were *various forms* of penning statutes in ancient times. The Prince's case. 8 Rep. 18. and anciently they were in form of *grants*; and sometimes in form of *articles*, and sometimes in form of *petitions*. Arg. 274. 2 Show. in the case of the *Quo Warranto v. the City of London*, cites Co. Litt. 527. 639.

† An exception to disannul an act of parliament was thus, viz. That the bill passed first in the upper house by the consent of the Lords, which was sent down into the lower house, and from thence was returned with this indorsement or superscription on the body of the bill, *a ceste bille les commons sont assentus avec la provision annexe*; but there is no provision extant upon record; but that very bill with that superscription or indorsement, and with the regal assent, and without any proviso indeed is filed with the rest of the bills, and the king's assent unto it, and labelled with the rest, whereunto the great seal is set, as the course is in private acts, which are not inrolled without special suit, as general acts are, for general acts are always inrolled by the clerk of the parliament, and delivered over into the Chancery, which inrolment in the Chancery makes them the original record (as it was resolved in *John Stubb's case*) but in private acts, the very body of the first bill filed and sealed as aforesaid, and remaining with the clerk of the parliament is the original record, and are not inrolled without special suit. Hob. 109. Trin. 14 Jac. The King and Lord *Hunsdon v. Lady Arundel* and Lord *Howard*.

2. It was held, that these words (*the king, with the assent of the lords and commonalty, grants or establishes, &c.*) is as well as if it was, that it is enacted at the request of the Lords and Commons, &c. to which the king assents; but the more usual words are, that it is enacted by the king, by the assent of the Lords and Commons, &c. But the more short and sufficient words are, that be it enacted by the authority of this parliament, &c. And see *Magna Charta* and the ancient statutes are quod *statuit rex* and well; for it is implied that it is no statute unless the Lords and Commons assent. Br. Parliament, pl. 76. cites 7 H. 7. 14.

a good act, &c. and yet shall not be an act if all those do not make the act; but where it was said that it was enacted by their assent, it shall be intended that they made the act. Per *Vavisor*, quod non contradicitur. Br. Parliament, pl. 107. cites 11 H. 7. 27.

• Of ancient time, when any acts of parliament were made, to the end the same might be published, and understood especially before the use of printing came into *England*, the acts of parliament

If an act of parliament be penned, that with the assent of the king, and the lords spiritual and temporal, and of the commons, it is enacted, &c. this is

There is no act of parliament but must have the *consent of the Lords, the Commons, and the royal assent of the King*; and as it appears by records and our books, whatsoever passes in parliament by this threefold consent, has the force of an act of parliament. 4 Inst. 25.

[493] 3. In 35 E. 1. the statute of *Carlisle de Asportatis Religioforum*, the prelates were omitted, and this statute was made by the king, the nobles, and the commonalty; and it is objected, that therefore this is no act of parliament, and for authority the roll of parliament in 21 R. 2. is cited, where it is said, that divers judgments were heretofore undone, for that the clergy were not present. To this some have answered, that a parliament may be holden by the king, the nobles, and commons, and never call the prelates to it; but we hold the contrary to both these, and shall make it manifest by records of parliament, wherein, for the better understanding hereof, we will observe this order; 1st, That the *bishops ought to be called* to parliament; 2dly, Where acts of parliament are good without them; and lastly, that this act of 35 E. 1. is an act of parliament. To the first, every bishop has a barony, in respect whereof, *secundum legem & consuetudinem parliamenti*, he ought to be summoned to the parliament as well as any of the nobles of the realm: and likewise 26 abbots and 2 priors had baronies, and thereby were also lords of parliament; and when the monasteries were dissolved, the lord's house lost so many members that had voices in parliament; but seeing it was done by authority of parliament it was no impeachment to the proceedings in parliament: to the 2d, *if they voluntarily absent themselves*, then may the king, the nobles, and commons make an act of parliament without them, *as where any offender is to be attainted* of high treason or felony, and the bishops absent themselves, and the act proceeds, the act is good and perfect; likewise if they be present, and *refuse to give any voices*, and the act proceed, the act of parliament is good without them; also where the voices in parliament ought to be absolute, either in the affirmative or negative, and they give their voices with limitation or condition, and the act proceeds, the act is good; for their *conditional voices* are no voices. 2 Inst. 585, 586. [and afterwards he gives instances as to the several particulars.]

4. The statute of *quia emptores terrarum* is a statute, and yet the king alone speaketh, viz. *Dominus rex in parlamento suo, &c. ad instantiam magnatum regni sui concessit, providit, & statuit*. But because it is dominus rex in parlamento, &c. concessit, it is as much in this case (being an ancient statute) as dominus rex autoritate parliamenti concessit. 2dly, It is (amongst other acts of parliament) *entered into the parliament roll*, and therefore shall be intended to be ordained by the king by the consent of the Lords and Commons in that parliament assembled. 3dly, It is a general law whereof the judges may take knowledge, and therefore it is to be determined by them, whether it be a statute or no. Co. Litt. 98. b.

Mr. Prynne, in his animadversions, &c. on the 4th

5. The difference between an *act of parliament*, and an *ordinance* in the parliament, is, for that the ordinance wants the threefold consent, and is ordained by one or two of them. 4 Inst. 25.

(A. 2)

inst. says, that there is *no* such difference, nor any *difference* at all *between an ordinance and an act of parliament*. True it is, there are sundry ordinances made by the king and his counsel out of parliament, for regulating abuses, or proceedings in Courts of Justice, the Mint, monies, victuals, or other occasions (inrolled in the close and patent, not parliament-roll) like orders of the king and lords of his counsel at this day, that are different from acts and ordinances of parliament, which are both the same, and had the threelold assent; as this clause in all writs for electing knights, citizens, and burgesses of parliament *ad faciendum & consentiendum hiis, quæ de communi concilio regni nostri contigerint ordinari* (from which the name ordinance of parliament is derived). The parliament-rolls and above 100 printed acts of parliament, which call acts ordinances, and ordinances acts of parliament, and couple the words *this act and ordinance* usually together, abundantly evidence beyond contradiction. If there were *any difference* between them, *it was this, that an ordinance was but a temporary act*, by way of probation, which the Commons might amend at their pleasure; *and an act of parliament a perpetual law*, which they could not alter when they pleased without the king's and lords concurrent assents, which difference is hinted in 37 E. 3. Rot. Parl. No. 38. Exact Abridg. p. 98. though multitudes of printed acts refute this distinction between them; or else, that the Commons petitions in parliament entered in the parliament-rolls, to which the king gave his royal assent, were stiled by some ordinances, and these petitions with the royal assent thereto, when made into statutes by advice of the king's judges and counsel, and entered in the parliament or statute-rolls, were stiled statutes or acts of parliament, as the precedents of this kind in the Exact Abridg. &c. evidence.——[The same author in his *Irenarches Redivivus* treats very copiously upon this subject, from pag. 27 to pag. 42. and in many places in his Exact Abridgment of the Records in the Tower.]

(A. 2) What shall be said a good Act of Parliament [494]
ment. In respect of the *Matter*.

1. **STATUTES** which *misrecite things*, and refer to them are void, and none shall be concluded by them. Pl. C. 400. The Earl of Leicester v. Heydon.

2. An act of parliament *can make an estate to cease* as if the party were dead. 6 Rep. 40. in Sir Anthony Mildmay's case, and cites 21 H. 8. that by the acceptance of a second benefice the first shall be void as if he was dead.

3. An act of parliament made *against natural equity* as to make *a man judge in his own cause* would be void; for *jura naturæ sunt immutabilia*. Hob. 87. Trin. 12 Jac. Day v. Savage. S. C. & P. cited Arg. 10 Mod. 115. Hill. 12 Ann.

C. B. in the case of Thornby v. Fleetwood; but says, that this must be a *very clear* case, and judges will strain hard rather than interpret an act void ab initio.——S. C. & P. cited Vent. 3. Mich. 20 Car. 2. B. R. at the end of the case of the Bishop of Lincoln v. Smith.

Holt Ch. J. thought what Lord Coke says in Dr. Bonham's case, 8 Rep. a very reasonable and true saying, that if an act of parliament should *ordain that the same person should be both party and judge*, or which is the same thing, judge in his own cause, it would be a void act of parliament; and an act of parliament can do no wrong, though it *may do several things that look pretty odd*; for it may discharge one from the allegiance he lives under, and restore to the state of nature; but it cannot make one that lives under a government judge and party. Per Holt Ch. J. 12 Mod. 687, 688. Hill. 13 W. 3. B. R. in the case of the City of London v. Wood.

So an act of parliament may not *make adultery lawful*, that is, it cannot make it lawful for A. to lie with the wife of B. but it may make the wife of A. to be the wife of B. and dissolve her marriage with A. Per Holt Ch. J. 12 Mod. 688. in the case of the City of London v. Wood.

4. A statute which is made only in affirmance of the common law, that is, that *does not enact any new thing, but does only enact that which was provided for by the common law, before the act made, though it did not so plainly appear*, is nevertheless a statute, and may be pleaded as a statute, although the defendant has a plea at the common law also (Pasch. 23 Car. B. R.). For it enacts
O o 3 nothing

nothing contrary to the common law, and may therefore well stand with it. L. P. R. tit. Statute 526.

5. An act of parliament *may capacitate* a man *to have or be an heir*, that otherwise could not have or be an heir. Lev. 75. Mich. 14 Car. 2. B. R. in the case of Wheatly v. Thomas.

6. No *desultory kind of inheritance* can be limited without an act of parliament of land, or of an advowson, because then he who had right could not always know against whom to bring his action: but of the *patronage of an hospital newly founded* there can be no precedent right; and therefore at the very first institution it may be limited as the king pleases, like the case of a rent *de novo*. Per Hale Ch. J. and the whole Court at a trial at bar. Chan. Cases 214. Mich. 23 Car. 2. Atkins v. Mountague.

7. In regard of all civil acceptations an act of parliament may *do any thing*: as, 1st, To make *a woman a mayor or justice of peace*; for these are the creatures of men; but cannot *alter the course of nature*. 2. It cannot do any thing out of the limits of his power, as to make a man inheritable in France. 2 Jo. 12. Per Wild J. in his argument in the case of Crow v. Ramsey.

8. An act of parliament can *create an estate tail without a donor*; and where we see estates limited for a particular purpose, we are not to measure the validity of such limitations by the strict rules of the common law; for the *parliament can control the rules of common law*. Raym. 55. Hill. 31 & 32 Car. 2. in Scacc. in case of Murrey v. Eyton.

[495] (B) The Commencement. [Relate to what Time.]

Acts of parliament shall have relation to the first day of the parliament, if it be all one and the same session; but if they are in diverse several sessions, and the king signs bills at the end of every session, there it shall have relation to the first day of this session; for every such session is a parliament in itself; quod nota diversity. Br. Relation, pl. 35. cites 33 H. 8. — S. P. But if there are several sessions, and the king does not sign any bill till the last session, there all is but one and the same day, and all shall have relation to the first day of the first session, and the first day and the last make all but one and the same parliament, and one and the same day in law, unless special mention is made in the act when it shall take force. Br. Parliament, pl. 86. cites S. C.

[1.] IF a man be indicted for erecting a cottage, and recites the statute of cottages to be, that if any person post consecutionem statuti erects any cottage, whereas the statute is, that if any person erects a cottage after the end of the sessions, this is not good; for the statute *relates to the first day of the session*, and is said in law *to be made the first day* of the session; and therefore the statute is not well recited. Mich. 8 Car. B. R. Hewes's case resolved, and such indictment quashed. Tr. 9 Car. B. R. Trap's case resolved, and diverse indictments quashed.]

Br. Jours,
pl. 6. cites
33 H. 6. 18.
S. C.

2. In the case of Sir J. P. who was attainted of certain trespasses by act of parliament, it was said by Fawkes clerk of the parliament, that *every bill which passes the parliament shall have relation to the first day of the parliament, though it be brought in at the end of the parliament*; and it is not usual to make any mention what day the

the bill is delivered in to the parliament; and thereupon the justices said they would advise; for the act came in to them by writ as an act of parliament, therefore quære. And the case was, that the parliament commenced before Whitsuntide, and continued after Whitsuntide, and the Commons agreed the bill after Whitsuntide, and gave day to Whitsuntide next, and the Lords gave day to Whitsuntide next except one, and all was one intent; for because the bill shall have relation to the first day of parliament, therefore if it be not prevented it shall be taken as this Whitsuntide which is past at this sessions; and therefore the Lords did well; quære. Br. Parliament, pl. 4. cites 33 H. 6. 17.—See the rest of this case at parliament (F) pl. 1.

3. Note, that the attainder of treason by act of parliament shall not have elder relation than *to the first day of the parliament*, unless it be by *special words* that he shall forfeit his land which he had such a day, and after; quod nota diversify. Br. Relation. pl. 43. cites 35 H. 8.

4. Acts of parliament *take effect the first day of the parliament*. Ibid. 222. except the act appoints another time from which it is to take effect, in case of Needler v. Bishop of Winton.—It has relation to the first day of the session. Dy. 95. pl. 37. Whitton v. Marine.—Hob. 111.—And. 295. pl. 303. Englefield's case.—Cro. C. 424. in case of Sidown v. Holme.—D. 231. Marg.

All acts of parliament relate to the first day of parliament, if it be not otherwise provided by the act. 4 Inst. 25.

Though in fiction of law a statute shall have relation to the first day, yet it is not a perfect statute till the end of the parliament; per Croke J. Jo. 370. Mich. 11 Car. B. R. in case of Sydowne v. Holme.

It is true generally, that an act of parliament commences the *first day of the session*, if nothing appears to the contrary; but there was an act to dissolve the marriage between Campbell and Mrs. Wharton, though the marriage was after the first day of the session; per Holk Ch. J. Comb. 413. Hill. 8 W. 3. in B. R. The King v. Call.

5. Two statutes made at the same parliament, one shall not have priority of the other; for they are made at one day and instant, and have relation each of them to the first day of the parliament, [496] though in two chapters, and shall be so construed as if all had been in one and the same act of parliament; per Jones J. Jo. 22. Hill. 20 Jac. C. B. in case of Standen v. the University of Oxon and Whitton.

6. The words in the last clause of the statute made in 21 Jac. 16. are, that *in all actions upon the case for slanderous words to be sued and prosecuted in any Court after the end of that parliament, if the damages be assessed under 40s. then the plaintiff shall recover only so much costs*. An action was brought before the parliament, and prosecuted after, yet it was resolved after argument, that the prosecution after, though the commencement was before the parliament, is within the statute by the word in the statute (prosecute). Latch. 2. Pasch. 1 Car. Car. Sendal's case.

7. 6 & 7 W. 3. cap. 20. *Pardoned all offences committed before 29 April 1695, except all offences committed contrary to any statute, or to the common law, for which any information, &c. at any time since had been commenced or sued, &c. in any of his majesty's courts* In an information upon the statute E. 6. against buying and selling live
O O 4

cattle, the jury find this statute at Westminster, &c. and is depending and remaining to be prosecuted, &c.

of 6 & 7 W. 3. and that no information was commenced, &c. or depending, &c. against the defendant for this offence, at the day of assembling and holding of the said parliament, nor within a years before, but that this information was commenced and sued against the defendant afterwards, and before the 29th April 1695, and was then depending. It was argued for the defendant, that these relative words in the exception, viz. *At any time since*, &c. should be expounded to refer to the first day of the assembling and holding of the parliament, which is the first day of the session, at which time this statute by relation was a law; for the judges cannot take notice of the time when it passed the royal assent; and cited 1 Sid. 310. And therefore since the session begun the 1st of November, 6 W. 3. and no information was then depending, the defendant was not by the exception exempted from the benefit of the pardon. But against this it was argued, that though an act shall be construed generally to relate to the first day of the session, yet that does not hold when there is a particular day mentioned, in which case the relation of the act is confined to such day, and cited Plowd. 79. b. Bro. Parl. 86. Hob. 222. Then since the 29th of April is appointed by the parliament for the time to which the pardon shall extend; and since the act by mentioning any time since, and which remains to be prosecuted, shews that it refers to another time since the first day of the session, that ought to be understood of the 29th of April, to which the pardon extends, and more especially since the same clause of exception refers as to another particular to the 30th of April. Of which opinion was the whole Court. And they held, that the exception ought to be taken as generally and as large as the purview; for the parliament could never design that their pardon should extend to pardon offences until the 29th of April, and that notwithstanding their exception, which restrains it from pardoning those which they thought unworthy of their pardon, should be so short, and that such should be unpunished. *Ld. Raym. Rep. 370, 371. Mich. 10 W. 3. The King v. Gall.*

8. When the king comes to meet the houses, then the parliament begins. *Per Cur. Ld. Raym. Rep. 343. Pasch. 13 W. 3. Birt Qui tam, &c. v. Rothwell.*

(C) *Statutes General. What shall be said General Statutes, whereof the Court ought to take Notice without pleading them.*

This is not the point of HOL-
LAND'S
case, but is in a nota of the Reporter.

1. **T**HE statute of 18 *El. cap. 11. concerning colleges, deans and chapters, parsons, vicars, and others, having spiritual promotions*, is a general act. *Co. 4. Holland 76.*

[497] [2. The statute of 13 *El. cap. 20. of non-residence of parsons* by 80 days, is a general statute. *Tr. 5 Ja. B. R. between Jennings and Haithwait vicar of Harwell adjudged. Co. 4. Dumper 120. b. this statute is intended.]*

**Yelv. 106. S. C. accordingly. Noy. 124. S. C. by name of Jennings's case, but very obscurely reported — Brownl. 208. S. C. accordingly; for though it extends to those only that have cure of souls, yet in respect of the multiplicity of parsonages and vicarages in England, the judges must take notice of it as a general law, and adjudge according to the said statute.*

It was agreed to be a general law. 2 *Mod. 56. Trin. 27 Car. 2. C. B.*

[3. The statute of 13 *El. cap. 10. of colleges, deans, and chapters, parsons, vicars, and others having spiritual promotions*, is a general statute. 4 *Rep. Dumper 120. b. P. 43. [45] El. B. R. Same case adjudged, Co. 4. Holland 76. [in a nota of the Reporter, cites S. P. adjudged.]*

The Chapter of Southwell v. the Bishop of Lincoln. — *Mod. 204, 205. pl. 35. S. C. says that Atkins J. doubted, but was over-ruled.*

[4. The

[4. The statutes of † 22 E. 4. cap. 7. and 35 H. 8. cap. 17. of felling and inclosing of wood, are general laws concerning all persons whereof * the Court Ex Officio ought to take notice. Co. 8. Sir Francis Barrington 138. Resolved.]

* Fol. 466.

+ Coke Ch. J. conceived

that 22 E. 4. cap. 7. was a general statute, of which the judges shall take notice without pleading of it. And his reason was, for that the king was party to it; and that which concerns the king being the head, concerns all the body and commonwealth. And so it was adjudged in the Chancery in the case of Serjeant Hale, that the statute, by which the prince is created Prince of Wales, was a general statute; and for that see the Lord BARKLEY's case in the Commentaries. 2 Brownl. 327, 328. Chalke v. Peter.

[5. The statute of 21 H. 8. cap. 13. of pluralities, is a general act. Co. 4. Holland 76. Resolved.]

Cro.E. 601. pl. 11.

Mich. 39

& 40 Eliz. B. R. ARMIGER v. HOLLAND, resolved accordingly.——Yelv. 106. Mich. 4 Jac. B. R. S. P. in case of Jennings v. Hathwaite.——Brownl. 208. S. P. accordingly, in case of Jennings v. Hathwaite.

[6. The statute of 1 El. cap. concerning leases made by bishops, is not a general act, but a special act, because it concerns the bishops only, which are but a species of the spirituality. Tr. 30 El. B. R. between * Elmer Bishop of London and Gate adjudged. Co. 4. Holland 76. [cites the case of Elmer, &c. v. Gate.]

S. P. And unless it be pleaded or found, we are not bound to take notice of it. Per Ellis J.

Freem. Rep. 179. pl. 191. Mich. 1674. in the case of Threadneedle v. Linum.——2 Mod. 57. S. C. and admitted there that it is a private statute.

* Mo. 253. pl. 400. S. C. and this statute is there called a statute general in particular, and there held that the Court was not bound to take notice of it.

[7. The clause of the statute of 3 Ja. cap. 5. which gives the presentations of recusants to the universities of Oxford and Cambridge is a private clause, and ought to be recited, though the residue of the statute be general, and need not to be recited. Co. 10. Chancellor of Oxford 57. b.]

S. C. cited by Hobart Ch. J. Hob. 226, 227. in the case of Anne Needler v. the

Bishop of Winchester, and said, that he granted that one chapter of an act of parliament may be both general and particular; because one chapter may contain divers acts and laws, which may be several and sundry in their natures, as if they were in several chapters, and cites the case of Dive v. Manningham upon the statute of 23 H. 6.——Sid. 24. pl. 4. Hill. 12 Car. 2. C. B. the Ch. J. cited the same cases in the case of Allen v. Robinson.

[498*]

8. The rule of law is that of † general statutes, the judges ought to take notice, though they are not pleaded, otherwise it is of special or particular statutes: and for the better understanding the books in this point, and what shall be said in judgment of the law statutum generale, and what is statutum speciale: it is to be understood that generale dicitur a genere & speciale a specie; and what are genus, species and * individua: know that spirituality is genus, bishoprick, deanry, &c. are species, and bishoprick, or deanry of Norwich are individua, sic dictum quia in partes dividi nequit. 4 Rep. 76. a. in a nota on Holland's case.

+ A general act which may extend to every man shall not be pleaded; for this is the common law, of which the justices are bound to take notice with-

out pleading. Br. Office del, &c. pl. 27. cites 13 E. 4. 8.——Br. Parliament, pl. 60. cites S. C.——S. P. Contra of a particular statute or custom, as of an act for cities, burghs, borough-english, gavelkind, or the like; but Brooke makes a quære, if an act of cities, &c. be particular, and says, it seems that it is; but Mortmain, and the like, are universal, and need not be pleaded. Br. Pleadings, pl. 113. cites 21 E. 4. 56.——Br. Patents, pl. 78. cites S. C.——Br. Parliament, pl. 64. cites S. C.

9. This

* 2 Saund.
254. 155.
Trin. 22
Car. 2. ad-
judged ac-
cordingly.
that this was a general law, of which the King's Courts ought to take notice without pleading of it. Lev. 86. Bentley v. Hore. ——— And so it was held per Hale Ch. J. 2 Lev. 103. Okey v. Sell.

9. This word (*officer*) is a word general, or genus, (*sheriff*) is a special word or species, and the (*sheriff of Norfolk*) is individuum; and therefore the statute of *Westm. 1. cap. 26.* by which it is enacted, that no sheriff nor other minister of the king shall take reward to do his office, but be paid of that which he takes of the king is a general act, because it extends to all officers in general; but the statute of * 23 *H. 6. 10.* which extends solely to sheriffs is only a particular and special act, as is held 3 Mar. D. 119. 4 Rep. 76. a. b. in a note on Holland's case.

See the note
on pl. 11.

10. Acts of parliament concerning *mysteries or trades* are general acts; but an act of parliament concerning the *trade of a grocer* is a special act, as is said 28 *H. 8. fol. 27.* Dyer; because the trade of grocers contains under it individua or singular persons, as this or such a grocer by name. 4 Rep. 76. b. in a note on Holland's case.

11. If an act be special, which extends to species; a multo fortiori is, that which extends to individuals. And to understand what acts as to persons are *general*, and what *special*, know that though the matter be special, so that under it are only individuals, yet if it be general *as to persons*, thereof the judges shall take conuſance; but if the act concern aliquod singulare seu individuum, though this be general as to persons, yet the judges shall not take thereof conuſance; as *appeal* is a special action, and contained under this general word writ; and yet the statute of Magna Charta, cap. 4. which concerns appeals, is general, and the judges ought to take thereof notice, as it is held in 10 *E. 4. 7.* But if the act was made, that no appeal shall be brought *of the death of J. S.* this act is particular, *causa qua supra*; so the act of Magna Charta, cap. 25. of *waste*, Westminster 2. cap. 25. concerning *assises*, and cap. 18. concerning *assise by tenant by elegit.* cap. 41. concerning *contra formam collationis*, 23 *H. 8.* of *attaint*, et similia are general laws, though they concern special actions: so 4 *H. 7. cap. 17.* and Merton, cap. 6. of *wards*, et sic de cæteris. But though the act as to persons be general, but the matter thereof concerns individua or singular things, as some particular manor or house, &c. where all the manors, houses, &c. are in one or divers particular counties, those are such particular acts of which the judges shall not take conuſance, unless they are pleaded or alleged by the party: but of every act (though the matter thereof concern individua or singular things) yet if they * *touch the king*, the judges ex officio ought to take conuſance; for every subject has an interest in the king, as in the head of the commonwealth. 4 Rep. 76. b. in a note of Lord Coke's on Holland's case.

* As the
statute of
2 Phil. &
M. cap. 11.
concerning
using the

trade of a dyer, &c. not being a cloth-worker, &c. though it concerns a particular thing, and therefore is private in its nature, yet the *forfeiture being to the king*, and so the king concerned, this *has made it a publick act.* Skin. 429. pl. 5. Pasch. 6 W. & M. B. R. The King v. Bugge.

12. It was enacted by parliament, *that all the corporations and licences made by King H. 6. shall be void*; this act shall be pleaded; for the Court is not bound to have consueance of it any more than of an act made for a particular person; for it is not general, but *particular in a generality*, as if it was enacted, that all bishops and all lords shall have such liberties, &c. this is but a particular act. Br. Office del, &c. pl. 27. cites 13 E. 4. 8.

Br. Parliam^{ent}, pl. 60. cites S. C.—Pl. C. 65. a. S. C. cited by Mountague Ch. J. as Ld. Say's case.—

Arg. Le. 306. pl. 427. in the case of Carter v. Claycole.

13. If the king grants to the citizens of Norwich, &c. and after by act of parliament all their liberties, &c. are confirmed by a *general confirmation of all cities and boroughs*, this is a special act and ought to be pleaded. Le. 306. pl. 427. Mich. 32 & 33 Eliz. C. B. in the case of Carter v. Claycole cites 13 E. 4. 8. 59. by Brian.

14. The statute of *quia emptores terrarum* is a general law, whereof the judges may take knowledge. Co. Litt. 98. b.

15. The act of 18 Eliz. cap. 6. concerning *colleges in the 2 universities*, and the colleges of *Eaton and Winchester*, is a particular act, of which the justices shall not take notice. 4 Rep. 76. a. in a note in Holland's case, cites it as adjudged Hill. 31 Eliz. Rot. 514. C. B. and affirmed in error in B. R. Hill. 32 Rot. 791. between Claypoole and Carter.

16. The statute of 18 Eliz. which enacts, *that all suits upon penal statutes ought to be by original writ*, is a general law, of which the Court ought to take notice. Noy. 60, 61. in 38, 39 Eliz. in the case of Greedly v. Whitcott.

17. It was resolved, that the statute of Westminster 2. *de malefactoribus in parcis*, and *carta de foresta*, are general laws concerning all persons, of which the Court ex officio ought to take notice. 8 Rep. 138. b. Pasch. 8 Jac. C. B. The 7th resolution in Sir Francis Barrington's case.

18. The defendants were indicted for disobeying an order of sessions *to pay money towards building a new workhouse in Middlesex, according to the statute 15 [14] Car. 2. [cap. 12.]* It was moved to quash the indictment, because it was founded on a private act of parliament; for though the title and preamble concerned the poor in general, yet it was a private clause upon which this indictment was brought; but after several debates the whole Court held, that this was a publick act; for the words are (viz.) *And for the further redress of the mischiefs aforesaid, be it enacted, that a workhouse shall be erected in Middlesex, &c.* so that here is a general remedy provided for the poor, though by different methods. Sid. 209. pl. 3. Trin. 16 Car. 2. The King v. Pawlin & al.

19. Act of parliament concerning the *river of Thames* is a publick act. Sid. 209. in pl. 3.

20. In debt upon bond, the defendant pleaded the statutes *for discharge of poor prisoners*; exception was taken; that it is a private act, and ought to have been pleaded at large; for it does not concern all poor prisoners, but only those who were imprisoned

prisoned at that time: but it seemed to the Court, that it *shall* be construed a publick act. 1st, Because all the people of England may be concerned as creditors to these poor prisoners. 2. It *is* an act of charity, and therefore ought to have a more candid interpretation. 3. It is an act *too long*, and difficult to be pleaded at large, so that it would put these poor people to a greater expence than they can bear, to plead it specially. Ld. Raym. Rep. 120. Mich. 8 W. 3. Jones v. Axen.

[500] 21. That the statute of 1 Jac. 1. cap. 22. concerning tanners, is a general law, 2 Lutw. 1410. in a nota there of the Reporter it is said to have been resolved Mich. 9 W. 3. Rot. 379. in C. B. in the case of Jaques v. Chandler.

The difference is, when an act concerns the king's revenues for the king's advantage, it is general, and judicial notice to be taken of it; *secus* where it concerns it, in order to a diminution thereof to the advantage of particular persons; and an act of parliament may be general in part and particular in part; per Holt Ch. J. 12 Mod. 249. Mich. 10 W. 3. Anon.

The act of 8 & 9 W. 3. cap. 18. of composition between debtors and creditors, is a private act. 23. Act of composition, and a composition pursuant thereunto, was pleaded in bar to an action of debt upon a bond, without reciting the act or laying venue for the composition; and for these faults jud. pro quer. 12 Mod. 249. Mich. 10 W. 3. Dennis v. Roberts. Ld. Raym. Rep. 381, 382. Mich. 10 W. 3. Platt v. Hill.

12 Mod. 613. S. C. and P. 24. This Court is not obliged to take notice of an act of pardon, unless the act compel this Court to take notice of it; (for an act of pardon is not a general act). And it is no consequence, that because a man may give it in evidence upon the general issue pleaded, that therefore this Court shall take notice of it in collateral cases; per Holt Ch. J. Ld. Raym. Rep. 709. Hill. 12 W. 3. B. R. in case of Ingram v. Foote,

(C. 2) Of what Statutes, *not being general*, the Court will take Notice without pleading.

1. TWISDEN J. thought, that though part of an act of 15 Car. 2. (upon which A. was indicted, for not paying money to a new workhouse, according to the statute) is private, yet if it concerns Middlesex, being the county in which this Court sits, the Court will take notice of it as well as those in London ought to take notice of statutes concerning London, without pleading of them in their Courts there. Sid. 209. Trin. 16 Car. 2. B. R. The King v. Pawlin & al. Overseers of the Poor of St. Clement's.

(D) Statute.

(D) Statute. In what Cases it shall take away the particular Interest of a particular Man.

[1. IF a man of the *clergy* has a grant of the king to be discharged of tenths whensoever it shall be granted by the clergy, if the clergy after grants a tenth, though *he who has the exemption be party to this grant*, yet his exemption remains: for this accords with the grant. 19 H. 6. 62.]

Though he was in the convocation when the tenths were granted, and

assented to it, yet he has not lost the advantage of his charter by not speaking of it before; for none there had power to allow it or disallow it; and if he had voted against the granting the tenths, yet a grant by *the major part would have been sufficient + whether he would or no. Br. Parliament, pl. 88. cites S. C. and 20 H. 6. 12.—+ The larger edition in folio of Brooke, is (enconter son souveraigne) which is misprinted for (euconter son soien) and so are the other editions.

[501*]

2. Strangers shall not be bound to take notice of a particular act of parliament, as they shall of a general act. Br. Double Plea, pl. 74. cites 37 H. 6. 15.

3. Confirmation by act of parliament cannot alter a condition, or make an ill writ good, viz. Of a thing which is not comprised within the grant; but contra of a thing contained in the grant, viz. The king grants a manor habendum with the advowson, &c. but if he grants my land, and this is confirmed by act of parliament, this is good; note the diversity. Br. Parliament, pl. 71. cites 38 H. 6. 37 & 38.

4. Where a man has title to land by a tail, and after the same land is given to him by parliament, his heir shall not be remitted; for by the act of parliament all other titles are excluded for ever; for it is a judgment of the parliament, that this gift only shall stand; per Englefield J. Br. Parliament, pl. 73. cites 29 H. 8. Button v. Savage.

So where the king has title in tail, and the land is given to him by parliament in fee, the tail &c. for the

is determined; so that the heir shall not avoid leases or charge made by his father, last statute binds all former titles and estates not excepted. Ibid.

5. An act of parliament between particular persons shall not bind strangers. And therefore it was adjudged in the case of the prior of Castle-acre and the dean of St. Stephen's (as appears by the record thereof 21 H. 7. 1. upon the statute 2 [1] H. 5. cap. 7. which gave the lands of priors aliens to the king), that this would not extinguish an annuity of the * PRIOR OF CASTLE-ACRE, which he had out of a rectory parcel of a priory alien, notwithstanding there was no saving in the act. And Mich. 25 & 26 Eliz. in + Boswell's case in the Court of Wards, it was resolved, that when an act makes any conveyance good against the king, or any other person or persons in certain, this shall not toll the right of any other, though there be no saving in the act. 8 Rep. 138. a. cited per Cur. Pasch. 8 Jac. C. B. in Sir Francis Barrington's case.

* Godb. 170. pl. 256. S. C. cited in the case of Chalk v. Peter, alias Sir Francis Barrington's case. + 2 And. 190. pl. 8. S. C. by the name of Halliwell v. the Corporation of Bridgewater, and says, that

it never was seen that a statute or other thing available to one respect, shall be taken or expounded to make a thing good to all respects.

(E) What

(E) *What Persons shall be bound by a Statute not being named. Infants.*

[1. **A**N infant shall be bound by the statute of 20 E. 3. . . . of receipts, to put in security according to the statute for the value, because the security is a *latere*, and the words of the statute are general (if any). 33 H. 6. 6. adjudged.]

2. A statute which gives corporal punishment, shall not bind an infant. *Contra* of other statutes, if they do not except infants. Br. Coverture, pl. 68. cites Doct. & Stud. lib. 2. fol. 113.

3. An infant is not taken within the statute of Westm. 2. cap. 25. that failer of record in assise shall make a disseisor; for the statute shall have reasonable construction. Br. Parliament, pl. 41. cites 4 H. 7. 10.

[502] (E. 2) *Private Statutes, Notes, and * Pleadings.*
* See (E. 3.)

1. **A** MAN was restored by parliament to land forfeited, and had writ to the escheator to put him in possession, and he returned disturbed by N. who came and said that he had no notice of the restitution by parliament, &c. And per Justiciarios, he is excused till notice, by which issue was taken that they occupied after notice; quod vide, that notice is requisite upon an act of parliament; the reason seems to be inasmuch as it is a particular matter; for it seems of a general act all are bound to take notice. Br. Parliament, pl. 35. cites 43 Ass. 29.

2. It was said that a private act of parliament shall not conclude men as a general act shall do, nor strangers to it are not so bound to take thereof notice as privies are; quod nota. Br. Parliament, pl. 27. cites 37 H. 6. 15.

Writ founded upon a particular act of parliament ought to comprehend certainty, and otherwise it is not good. Br. Parliament, pl. 66.

3. A particular act was made, that the Chancellor calling to him one justice may award subpoena between A. and B. and make an end of the matter. There, by all the justices except Littleton, they shall not award subpoena general, but special subpoena making mention of the act; for he shall pursue the act strictly, and a common act for common profit shall be construed largely; *quære* if the justice shall be named in the subpoena. *Quære* if the justice dies, if the Chancellor may call to him another justice; et non adjudicatur. Br. Parliament, pl. 61. cites 14 E. 4. 2.

cites 22 E. 4. 47.—Br. Brief, pl. 399. cites S. C.—3 Le. 133. Arg. cites S. C.

3. P. So of any other person be to be impleaded, vouched or prayed in aid. Br. Parliament, pl. 38. cites S. C.

4. Where in action, voucher or aid prayer is against the queen, she is a sole person by statute in some cases; and in these cases it ought to be pleaded, and shewn certain; because it is a private statute; per Brian Ch. J. and others; quod non negatur. Br. Pleadings, pl. 71. cites 3 H. 7. 14.

5. When

5. When a private act is pleaded, it is not good to say *inter alia inactitat' est*, &c. but if it concerns several distinct matters, to recite all that concerns the *materia subjecta*, and to aver that it is all that concerns this matter. Freem. Rep. 75. pl. 92. Trin. 1673. *Ld. Byron's case*.

6. Every man is so far party to a private act of parliament, as not to gainsay it, but not so as to give up his interest. It is the great question in *Barrington's case*, 8 Rep. The matter of the act there directs it to be *between the foresters and the proprietors of the soil*; and therefore it shall not extend to the commoners to take away their common: suppose an act says, *whereas there is a controversy between A. and B. It is enacted that A. shall enjoy it*. This does not bind others, though there be no saving; because it was only intended to end the difference between them two; per *Hale Ch. J. Vent. 176. in case of Lucy v. Levington*.

7. When a private statute is mispleaded, and the plaintiff demurs thereupon, but does not shew the mispleading for cause; it was doubted whether the Courts may either by the printed book of statutes, or by the record, or otherwise, take notice that the statute is otherwise than the party has pleaded it. Sid. 356. pl. 7. Hill. 19 & 20 Car. 2. B. R. *Holby v. Bray*.

If a private statute be misrecited, the Court must take it to be as it is pleaded, unless the plaintiff de-

nies it, as he might by pleading *nul tiel record*, or by alleging that it is further enacted, &c. and then, if it is material, he shall take advantage. *Ld. Raym. Rep. 382. Mich. 10 W. 3. Platt v. Hill*.

8. Private acts, which go to one particular thing, are to be [503] interpreted literally. 2 Mod. 57. in case of *Threadneedle v. Lynam*.

3 Lc. 133. Arg. in case of *Wroth v. the Countess of Suffolk*.

9. Private acts of parliament may be put in issue, and tried by the record upon *nul tiel record* pleaded, unless they are produced exemplified, as was done in the *PRINCE'S CASE*, in my Lord Coke's 8 Rep.—and therefore the averment of *nul tiel record* was refused in that case. *Hale's Hist. of the Law, 16*.

(E. 3) Pleadings in Actions on Statutes in general.

See (E. 5) of misrecitals.

1. **I**N trespass, the plaintiff declared for distress in one county, and carrying it into another county, which is prohibited by the statute, and did not make mention of the statute in his writ or count, and exception taken; et non allocatur; the reason seems to be, inasmuch as it is a general statute which prohibits that none shall do it; contra of particular statutes, as appears in the time of H. 7. Br. Parliament, pl. 32. cites 30 Aff. 38.

2. An act of parliament of restitution of the heir after attainder of treason was, that the heir may enter, except where the king was bound to recompense, and he brought *scire facias* upon the act to repeal letters patents made by the king to J. N. in fee, to shew wherefore

wherefore the land should not be resumed and delivered to the plaintiff, and this word (*resumed*) was not in the *act*; and yet the best opinion was, that this surplusage in a judicial writ is no default. Br. Nugaton, pl. 8. cites 7 H. 4.

3. In action upon the statute of labourers, Paston would have counted and rehearsed the statute in his count; but Preston said, he need not rehearse the statute by which he counted without rehearsing it, quod nota; the reason seems to be inasmuch as it is a general statute. Br. Parliament, pl. 15. cites 5 H. 5. 11.

4. Where form of a writ is given by the statute, and a man takes common writ, he shall not have damages, but according to the common law, et e contra, if he takes the form of action given by the statute: but where no new form is given by the statute, there he shall recover upon the statute by writ of common form; note the difference by the best opinion. Br. Action sur le Statute, pl. 6. cites 9 H. 6. 2.

5. Where it is enacted, that J. S. shall answer of all riots and trespasses done to W. N. by bill in B. R. and writ issued to answer to certain riots and trespasses according to the *act*, &c. and did not express certainly what riots and trespasses, and per Judicium, the defendant was therefore dismissed; for though the *act* be general, yet the writ shall be special; but the course in B. R. is to award capias ad respondendum to certain trespasses or felonies, and well; but contra it shall be upon a special *act* of parliament. Br. Parliament, pl. 74. cites 24 E. 4. 47.

6. Information was brought in the Exchequer for giving of liveries, and did not declare upon what statute of liveries, and exception was taken, et non allocatur; inasmuch as it was for the king, and the best shall be taken for him, scilicet, that which gives the greatest punishment, as it seems. Br. Action sur le Statute, pl. 47. cites 5 H. 7. 17.

[504]

In waste
against te-
nant for
years or life,

the statute shall be rehearsed, because there was no other action or prohibition at common law. Br. Parliament, pl. 75. cites S. C. per Mordant.

S. P. Br.
Parliament,
pl. 75. cites
S. C. per
Mordant.

8. But against guardian in chivalry, and tenant in dower, it is otherwise; for of this prohibition was at the common law. Br. Action sur le Statute, pl. 47. cites 5 H. 7. 17.

S. P. And
so in action
by exe-
cutors de
bonis aspor-
tatis in vita
testatoris;
liament, pl. 75. cites S. C.

9. But in action of debt against administrators by statute he shall not rehearse the statute. Br. Action sur le Statute, pl. 47. cites 5 H. 7. 17.

S. P. And
so in quod
si deforseat,
and the

10. And in formedon in descender, which is only by statute, the statute is not rehearsed; but this is inasmuch as the writ is re-
hearsed

hearsed in the statute, as it is of quod ei deforceat. Br. Action like, he shall not mention it
sur le Statute, pl. 47. cites 5 H. 7. 17.

either in his writ or count; but *contra in trespass upon the statutes of forcible entry and of malefactors in parks*, the statute shall be rehearsed in the writ; for the statute is in the affirmative, and unless it be rehearsed, it does not appear, whether he brings the action at the common law, as he may, or upon the statute. Br. Parliament, pl. 75. cites S. C.

11. Where an act of parliament is, *that grants made to cities and boroughs shall be good secundum eorum contenta*, there, if the grant be not good, the act of parliament does not make it good; for it is *secundum eorum contenta*. Br. Parliament, pl. 64. cites 21 E. 4. 56, 57. Br. Corporations, pl. 65. cites 21 E. 4. 55, 56. S. C.

12. A man shall take advantage of a general act without pleading it. *Contra of a particular act.* Br. Parliament, pl. 64. cites 21 E. 4. 56, 57. S. P. Br. Parliament, pl. 38. cites 3 H. 7. 14.— A statute is

made *general* for all men, therefore may be pleaded *generally*, but *particular statutes* which go to particular men shall be *otherwise*. Br. Parliament, pl. 40. cites 4 H. 7. 8.

13. If an act is made which *pardons all men which were with the party of R. 3.* In pleading this statute he *ought to say, that he was with the party of R. 3.* But if the statute be general, there is no need for the party to allege it, inasmuch as all men are bound to have conusance thereof. And also when a *statute is made for the benefit of one man*, if he will not use the advantage thereof by shewing it, it is at his peril; as if the king will pardon a man by his charter, he shall not have benefit thereof unless he will himself. See D. 27. b. 28. a. pl. 180. Hill. 28 H. 8. in the case of the Abbot of Westminster v. the Executors of Clerk.

14. The statute of 32 H. 8. cap. 9. made *against maintenance* was recited to be made at a parliament begun 28 April, 32 H. 8. whereas it began on 28 Apr. 31 H. 8. and was continued by prorogations till 32 H. 8. and then the act was made, so that no parliament was held as the plaintiff recited. It was agreed, that the count shall abate for the misrecital. Pl. C. 79. a. 84. a. Hill. 6 & 7 E. 6. Partridge v. Strange and Croker. H. was indicted and found guilty of a misdemeanor in altering an assessment, which he with the other com-

missioners signed in pursuance of the *land-tax act*, which was enacted at a sessions of parliament held in November, quarto Annæ Regiæ. Exception was taken, that in the indictment the act was not well set forth; for though the writs of parliament were returnable *the 14th of June*, the time mentioned in the indictment, and right according to the printed book, yet being *prorogued till October*, the sessions did not commence till then; whereupon the indictment was quashed. 11 Mod. 113. Pasch. 6 Ann. B. R. The Queen v. Hickerlingill.

15. Where *one act prohibits a thing and another inflicts a [505] penalty* for doing it, both the acts must be recited; for they are *both as one act*; per Saunders Ch. B. Pl. C. 206. in the case of Stradling v. Morgan. Ow. 135. S. C. cited by Warburton J.

but says, that where the statute is only revived without any addition to it, there *contra formam Statuti* is enough.

16. If there be an act of parliament, in which are *diverse branches*, a man may mention *one only* if it serves his * purpose; * In pleading an act of parliament it is but
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never used to allege more of it than serves his purpose, and he need not plead the whole act. D. 103. b. pl. 7. Mich. 1 & 2 Ph. & M. Fulmerston v. Steward.——S. P. 2 Jo. 50. E. of Shaftsbury v. Ld. Digby.——2 Vent. 215. Anon.——For every part of it is an act, and part of a statute may be publick and part private, as the statute of West. 2. Per Bridgman Ch. J. And for the first cites Pl. C. 65. Dive v. Maningham; and for the last cites Hob. 227. Needler's case; and that the statute of Recusancy is general, but that part of it which concerns universities presenting to the livings of recusants is private, and must be pleaded, he cited 10 Rep. Chancellor of Oxford's case. See Sid. 24. in the case of Allen v. Robinson.

410. b. in the case of Newys & Scholastica v. Larke.
+ S. P. Br. Pleadings, pl. 164. cites 10 H. 7. 19. 15. though the proviso arises to his disadvantage.——And it was said by Treby Ch. J. that where an *exception* is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to shew the proviso. Ld. Raym. Rep. 120. Mich. 8 W. 3. Jones v. Axen.

This *diversity* was taken by Brotherick, that he that will take advantage of an act of parliament with an exception must shew himself out of the exception, viz. If the exceptions be of persons the rule holds; because the Court, upon reading of the statute, cannot know whether he be the person excepted or not; and therefore the party, who knows himself best in that case, must shew himself out of the exception: and it is an advantage given by the statute to such as are not disabled to take it by the exception; but if the exception be of offences, of which the Court may be informed by reading the statute, he that pleads the statute need not say, that it is an offence not excepted; and for this he cited Noy. 99. Mo. 619. 12 Mod. 612. Hill. 13 W. 3. B. R. in the case of Ingram v. Foot.

Holt Ch. J. said, he was not satisfied with the cases, where it is held, that a man pleading an act of pardon ought to aver, that he is not within the exceptions; but the said matter ought to be replied by the plaintiff or the Attorney General, as the case happens to be. And it is so in all cases of private acts of pardon whatsoever; and the cases to the contrary are not founded upon solid reason. Ld. Raym. Rep. 709. Hill. 13 W. 3. B. R. in the case of Ingram v. Foote.

17. Where a man will take benefit of an act of pardon, he must aver, that he is not a person excepted; but where he claims no benefit by it, but only to keep that which he had before the act, in such case he need not make such averment; per Harper and Dyer accordingly. Pl. C. 488. in Nicholl's case.

18. In an action upon a statute which prohibits a thing upon which a penalty is demanded, the issue may be *non culp.* or *non debet*; and so it has been oftentimes resolved in this Court. Cro. E. 766. Trin. 42 Eliz. Wortly v. Herpingham.

19. Statute of limitations being pleaded to be made 24 Jac. was held to be naught; but in another case, it being pleaded to be made in the 21st year of the reign of King James over England, Scotland, &c. was held good enough: they would not take notice what year of his reign over Scotland it was, it being right for England. But it was agreed, that though this is an act that the judges shall take notice of, being general, yet if the party takes upon him to plead it specially, and mistakes, it is fatal to him. Freem.

[506]* Rep. 311. pl. 380. in Canc. Anon.

The Courts at Westminister ought to take notice of the beginning of all parliaments; per Cur. Ld. Raym. Rep. 343. Pasch. 10 W. 3. S. C.——S. P. Lev. 196. Mich. 22 Car. 2. B. R. in the case of the King v. Wild.

20. The surest way of pleading an act of parliament is to shew, that the parliament was held such a year of the king, without taking notice of the commencement, which is good pleading; per Levins, Serjeant. Ld. Raym. Rep. 210. Pasch. 9 W. 3. in the case of Birt qui tam, &c. v. Rothwell.

21. Where

21. Where in pleading an act of parliament it is said, that the parliament *continued usque ad such a day*, the words (*usque ad*) in such cases of acts of parliament always *include the day* to which the *usque ad* is applied; but in all other cases the *usque ad* is exclusive of the day. But in cases of acts of parliament it is usually said, that the parliament was held *usque ad* such a day, *quo die* it was prorogued. Arg. to which the Court agreed. And Treby Ch. J. said, that the word prorogation was not found upon the Rolls till the time of E. 4. Ld. Raym. Rep. 210. Pasch. 9 W. 3. Birt Qui tam, &c. v. Rothwell.

22. Where an *action* is brought *upon a statute*, as the statute of H. 8. of non-residence, which was *no offence at common law*, and he *misrecites the statute*, so as there is no such statute as he has declared upon, and he concludes *contra formam statuti*, it is ill; for though the statute be a general statute, yet the plaintiff has confined himself to that statute, upon which he declared by these words, *contra formam statuti*. Ld. Raym. Rep. 343. Pasch. 10 W. 3. Birt Qui tam v. Rothwell.

by *vigore statuti prædicti*, or *contra formam statuti prædicti*, this misrecital will be fatal; but if the conclusion be *contra formam statuti* generally, the judges will take judicial notice of it as much as if it had been shewn in the plea. And the same law of any other variance. Per Holt Ch. J. Ld. Raym. Rep. 382. Mich. 10 W. 3. in the case of Platt v. Hill.

If a publick act be misrecited in the time, if the plea be tied up to the statute which the defendant has pleaded

23. When a *session* of parliament is *held after a prorogation*, then they say, that it was held by prorogation *such a day*; but they never say held the day of the adjournment, but *such a day* of the sessions, without taking notice of the adjournment, which is a continued act. Ld. Raym. Rep. 343. Easter 10 W. 3. in the case of Birt qui tam, &c. v. Rothwell.

rogation when it was by adjournment, it will be fatal; and before the time of H. 6. acts of parliament were by way of petition and answer. Per Holt Ch. J. 12 Mod. 602. Mich. 13 W. 3. B. R. Anon.

When a statute is made at a session of parliament held by prorogation, the most brief and sure way is to plead *quod ad sessionem parliamenti tent.* such a day and year at such a place. Lutw. 140. in a note there, cites Cro. J. 111. Ford v. Hunter. — Cro. J. 111. pl. 9. Hill. 13 Jac. B. R. The case was, the plaintiff supposed the statute to be made *ad parlamentum tentum* 8 Eliz. whereas it began 5 Eliz. and so it ought to have been *ad sessionem parliamenti tent.* in anno 8vo. Eliz. and therefore after demurrer it was ruled to be ill.

24. There is not that strictness required in pleading an act of parliament *upon a collateral* matter, as when it is directly pleaded against the king. 12 Mod. 613. Hill. 13 W. 3. B. R. in case of Ingram v. Foot.

25. Tenant for years cannot assign over his *term* without writing; but the assignment may be pleaded without saying it was by deed. If a thing might have been *done at common law* without writing, and an act of parliament comes and says it shall not be good without writing, that shall not alter the *manner of pleading*, but the pleading shall continue as before, and its being in writing shall come in evidence: *but if a thing be made good originally by act of parliament*, there you must plead all the circumstances of the act, as upon the statute of 32 H. 8. of wills, you must set out that the will was in writing, and so plead it;

per Cur. 12 Mod. 540. Trin. 13 W. 3. B. R. Birch v. Bellamy.

26. *When a statute gives a plea, it must be pleaded in the words of the statute*; per Holt Ch. J. 11 Mod. 207. Hill. 7 Ann. B. R. Hull v. Holliday.

* (E. 4) *Process in Actions on Statutes.*

1. **I**N actions given by statute, a man shall not have other process than is limited in the statute; but if it comes in by presentment or by indictment, process of outlawry lies; but where writ which was at the common law before is given in a new case, as debt against executors, or trespass for executors of goods carried away in the life of the testator, such process shall be made as it was in those actions before at the common law; per Babb. Br. Process, pl. 57. cites 8 H. 6. 9.

Sec (E. 3).

(E. 5) *Misrecital.*

1. **I**F the king by act of parliament recites an act where there is no such act, and confirms the same estate of the party contained in the act, this is a conclusion to all to say, that the tenant had nothing in the land at the time of the making of the act, or at the time of the confirmation; per Hussey. Quære. Br. Parliament, pl. 78. cites 9 H. 7. 2.

* See pl 3.
—† It has
been
holden ne-
cessary to
shew in
what
county the
parliament

2. If a man in an action or pleading alleges a statute, and misrecites it in matter or in year, * day or † place, the other may demur generally; for there is no such statute, and then there is no such law; for every one who meddles with it ought to shew the law truly; but in case of the king it may be amended, and this in another term. Contra for a common person. Br. Parliament, pl. 87. cites 23 H. 8.

was holden, but that the omission of the day is no fault. 2 Hawk. Pl. C. Abr. 227. S. 65.

‡ S. C. cited Arg. 2 Bull. 49 in case of Creswick v. Rookby.

S. C. and
P. cited
Godb. 121.
Hill 29
Eliz. C. B.
in case of
Widal v.
Astron —
S. C. cited 2
Le. 186. in
Farnan's
case. —
But where
the Bishop
of Norwich

3. If one recites a statute made such a day where no statute was made at that day, he has failed; for he does not refer the statute to the knowledge of the judges, as he had done if he had said contra formam statuti in such case made and provided, in which case had he so said, the law would refer the thing to such statute as had been apt for it, but he has recited one act, and he does not intend any other; and if there be no such, then he has grounded his action upon that which is not, and so the recital of the day, which is surplusage, makes the matter vitious, if it be misrecited. Arg. Pl. C. 79. b. and Ibid. 84. b. S. P. accordingly, by Montague Ch. J. in case of Partridge v. Strange & Croker.

pleaded a private act of parliament, and mistook the day of the commencement of the parliament, the other party demurred generally. But judgment was given against [it seems that it should be (for)] the bishop; for though the act be private, whereof the Court is not bound to take notice, yet the day

day of every parliament is publick, of which they are bound to take notice. Mo. 551. 1. pl. 742. Pasch. 41 Eliz. B. R. The Bishop of Norwich's case.

So in debt upon the statute of Ed. 6. for not setting out his tithes, the plaintiff declared quod cum 4 die Novemb. 2 E. 6. it was enacted, &c. and so recites the statute: after a verdict for the plaintiff, it was moved in arrest of judgment that there is no such statute, because the parliament began 1 Ed. 6. and continued by prorogation till 4 Novemb. 2 E. 6. and so the plaintiff mistaken. Sed non allocatur, because there are 1000 precedents contra; and in respect of the continual usage of laying the statute in this form as the plaintiff has declared, the Court said they would not alter it; for that would be to disturb all the judgments that ever were given in this Court. Yelv. 126, 127. Pasch. 6 Jac. B. R. Oliver v. Collins. — Brownl. 100. S. C. accordingly, and the one is a transcript from the other. — S. C. cited 2 Mod. 241. in the case of Spring v. Eve, and said this had been often held good, et multitudo errantium tollit peccatum.

In debt upon the 29 Eliz. cap. 4. brought by the sheriff for his fees in serving an execution; after a verdict for the plaintiff, it was moved in arrest of judgment, that the time of holding that parliament was misrecited; for by the copies out of the Rolls, it appears to be held and to begin 29th October; and the plaintiff had declared that it began on the 15th of February, whereas in truth it was adjourned from that time to the 15th February, and then continued till it was dissolved. But the Court were all of opinion, that though it was mistaken, yet the misrecital is cured by the verdict, and he should have pleaded nul tiel record; but having admitted it in pleading, they cannot judicially take any notice to the contrary. 2 Mod. 240. Trin. 29 Car. 2. C. B. Spring v. Eve.

So the statute of 5 & 6 E. 6. 14. in the printed book, is mentioned to be made at a parliament held by prorogation upon the 23d January, whereas by the roll it is the 30th January, in an information grounded on this statute, it was moved that there was no such statute in force; for that in the 13 Eliz. cap. 25. which continues the statute of 5 & 6 E. 6. it is said likewise to be held 23d January, which being mistaken, there is no such statute, and so no continuance. But the Court would not allow it; for this being an ancient statute of continued use and general good, and no other statute as to this purpose in being, the intent of the makers is plain; and at this time of day they will not admit of such an opinion. Skin. 110, 111. pl. 2. Trin. 35 Car. 2. B. R. Anon.

Serjeant Hawkins says, a misrecital of the place or day on which the parliament was holden, by which a publick statute was made on which the indictment is grounded, vitiates the indictment; for the Court takes judicial notice of all such statutes, and will not make good a proceeding which of the party's own shewing appears to be commenced on a supposed statute of this kind, where there is no such statute. As if a parliament be summoned to meet on the 23d of January, and before the meeting be prorogued to the 25th, &c. and a statute made by it be recited, as made in a parliament holden on the 23d, &c. Or if a parliament first holden in one year, be prorogued to another, and a statute made the second year be recited, as having been made at a parliament holden or begun in such second year, which is all one, instead of saying that it was made at a sessions of parliament then holden, and the indictment conclude contra formam statuti prædicti, &c. yet faults of this nature may be helped by the constant course of precedents on a statute, or by concluding contra formam statuti, without adding prædicti; or, as some say, by the defendant's admittance, that there is such a statute as is supposed a repugnancy in setting forth the time when a parliament was holden, is fatal; as if a statute be recited to have been made in the 1st and 2d years of such a king. 2 Hawk. Pl. C. Abr. 226, 227. S. 65.

4. He that recites a statute, is not bound to recite the very words thereof, so long as he misseeth not of the substance and necessary consequence thereupon; and yet the safer way is to vouch the words of a law as they be. Co. Litt. 98. b.

5. If one in his declaration recites a statute which he need not do, and misrecites the same, this misrecital shall make the declaration bad. 2 Bulst. 50. in case of Creswick v. Rooksby, cites it as resolved in B. R. in 32 Eliz. between Gosnal and Kindlemas. Cro. E. 82. S. S. but not S. P.

6. In an indictment upon the statute of 8 H. 6. exception was taken that the statute is, if a recovery in assise, or action of trespass by verdict, or in any other manner, &c. and these words (or in any other manner) are omitted; so the statute is misrecited. And this was held a material exception, for in this the sense of the statute is altered, for this is tied to a recovery by verdict only; but if it had been misrecited in a point not material, it had been otherwise.

wife, and the indictment was discharged. Cro. Eliz. 186. pl. 10. Trin. 32 Eliz. B. R. Farr v. East.

• S. P. Per
Archer J.
Cart. 150.
Mich. 18
Car. C. B.
in case of
Foot v.
Berkley.

6. In an action upon the statute of 8 Eliz. 2. of arrests, exception was taken to the declaration, that the statute was misrecited; for the statute is, *if any person shall voluntarily procure any other to be arrested, to answer in the Court of, &c. where any privilege is used to hold plea in actions personal.* And the statute is recited, where any privilege is used to hold plea in *any action*, omitting (*personal*) and so as it is recited, it refers to all actions: and so was the opinion of the Court, that it was a plain misrecital; and though the statute is ^{*}general, and need not to be recited, yet when he recites it falsely it makes the plea ill; and for this cause principally it was adjudged that the plaintiff nihil capiat per Billam. Cro. Eliz. 236. pl. 1. Trin. 33 Eliz. B. R. Vander Plunken v. Griffith.

Ow. 19.
S. C. but
not S. P.

8. If a statute which is a general law be misrecited, though both the parties do agree that there is such a statute, yet the Court who is to take notice of a general law, knowing that there is no such statute as is pleaded, could give no judgment. See Cro. E. 245. Mich. 33 & 34 Eliz. B. R. Love v. Watton.

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9. Eden and others were indicted upon the statute of 8 H. 6. cap. 9. of forcible entry, for that he and diverse others in the indictment named, forcibly entered and disseised Alice Knotsford. 1st, Exception was taken, for that the statute is recited, that if any be *expelled or disseised*, whereas it ought to have been expelled and disseised. But it was said, that the printed books, and also the parliament roll, is in the disjunctive; and therefore non allocatur. Cro. E. 697. pl. 10. Mich. 41 Eliz. B. R. Eden's case.

10. Another exception was, because the statute is, *if any seoffment or discontinuance thereof be made, &c.* and then reciting the statute, this word (*thereof*) was left out. And for this cause held to be ill; for there is not any such statute, and the misrecital of a statute is cause to avoid it. Cro. E. 697. pl. 10. Eden's case.

11. Exception to an indictment upon the 8 H. 6. of forcible entry was, because the statute was misrecited in the indictment, setting forth that the fine mentioned in the statute was given *dicto domino regi*, whereas the words in the statute are *domino regi*, without (*dicto*). The whole Court were clear of opinion that it was a good exception, and that it had been several times so adjudged; and therefore the party was discharged, and a writ of re-restitution awarded. Bull. 218. Trin. 10 Jac. The King v. Coles.

Brownl.
196. S. C.
by the name
of Woolsey
v. Shep-
herd, and
the Court
held, the
mistaking
the day of
the act is

12. In assault, &c. and false imprisonment, the defendant justified under a warrant directed to him by a justice of the peace, to take and imprison the plaintiff for keeping an alehouse contrary to the statute made 12 February 5 Eliz. whereas it was made 12 February 5 Ed. 6. but adjudged, that this misrecital was not material; because being a general act, the justices ought to take notice of it. Godb. 178. pl. 249. Mich. 8 Jac. C. B. Jolly Woolsey's case.

not prejudicial by way of bar, but by way of count it must be laid truly.

13. In an action of false imprisonment against the defendant and two other justices of peace, they justified under the statute *1 M* that it should not be lawful for any maliciously and contumeliously to molest or disquiet any person or persons which are or after should be preachers. Upon a general demurrer to this plea, exceptions were taken, that the statute was misrecited; for the words in the statute are in the *disjunctive* maliciously or contumeliously; but adjudged, that where the words precedent and subsequent in the disjunctive are all of one sense, there the word (*or*) is all one with the copulative (*and*) but where they are of divers natures (as by word or deed) it is otherwise. Another exception was, that the words in the statute are (by the *greater* part of the justices) whereas the recital was (by the *better* part of the justices); but notwithstanding these exceptions, it was adjudged against the plaintiff: Godb. 246. pl. 343. Hill. 11 Jac. B. R. Croffe v Stanhope.

14. In an action upon the statute of Winchester, 12 E. 1. of hue and cry, a verdict was for the plaintiff. It was moved in arrest of judgment, that the plaintiff in his declaration had misrecited the statute. Roll Ch. J. took this difference, that if one bring an action on a *statute*, and in his declaration misrecites it in words that *go to the ground of the action*, though there be a *verdict* in the case, yet it is not helped. But if the misrecital be in words that do not go to the ground of the action, it is helped after verdict by the statute of Jeofails. Sty. 231. Trin. 1650. B. R. Boomer v. Cleve.

S. C. cited
Freem.
Rep. 429.
pl. 578. in
case of *Ld.*
SHAFTS-
BURY V.
Ld DIGBY,
by name of
BLOMER'S
CASE 1649.
and says,
that he re-
cited the

statute of 13 E. 1. cap. 1. S. 2. according to the printed book, which is burning of houses, whereas the roll is ** arsons*, and not *arsons de measons*. Yet being his action was brought for a robbery, and he had recited that part well enough, the plaintiff had his judgment.

* The recital was (*incendia domorum*) and the precedents are all so; but the parliament roll is (*incendia*) generally without (*domorum*) and it was held good enough, and judgment given accordingly. 2 Mod. 99. cited in the S. C. — 2 Jo. 51. says, this was the case of *BOWMER V. FERRIS*, and other Inhabitants of Godlaxton Hundred; and that the record was entered Hill. 1649. B. R. Rot. 503. and was shewn to the Court, and a copy of the act brought by order of the Court from the Tower of London. — S. P. 5 Mod. 318. in case of the King v. Slatford.

15. In action upon the statute *de scandalis magnatum*, and verdict for the plaintiff, it was moved in arrest of judgment, that the statute is of *dukes, earls, justices, and other great officers of the realm*; and they had recited in their declaration *de ducibus, prælatis, &c. et magnis officiariis regni*, and left out the words (*and other*) which it was alleged, had altered the whole sense of the statute; for by this means the statute should extend only to such as were named before, whereas it extends to several great officers that are not named, viz. *Ld. Chamberlain or High Constable*. Rainsford delivered the opinion of the whole Court, that it is well enough; for the plaintiff has truly recited so much as concerns his purpose to ground his action upon, and if he had recited no more, it had been well enough: and he said, there is no difference betwixt this and *BLOMER'S* case, [which see pl. 14.] and so is the case of *DIVE* and *MANNINGHAM*, that a man need recite no more than makes for his case; and so he gave judgment.

2 Jo. 49.
S. C. —
Mod. 98.
S. C.

in nomine totius Curie pro quer.' Freem. Rep. 425, 426. pl. 572. and Pasch. 1676. and page 429, 430. pl. 578. Trin. 1676. *Ld. Shaftsbury v. Ld. Digby.*

16. In pleading the statute of 23 H. 6. of sheriff's bonds, instead of (*counties*) it was said (*courts*), and where the statute makes void an obligation taken (to himself) he *omitted* in his plea *the words (to himself)*. The doubt was, whether when a private statute (as this was admitted to be) is mispleaded, the Court may, either by the printed book, or by the record, or otherwise, take notice, that the statute is otherwise than the party has pleaded it. *Adjournatur.* Sid. 356. pl. 7. Hill. 19 & 20 Car. 2. B. R. *Holby v. Bray.*

•Hard. 324. pl. 4. Pasch. 15 Car. in the Exchequer. —

† S. C. cited Arg. 6 Mod. 62. Mich. 2 Annæ, B. R. in case of *MILLS v. WILKINS*, But Holt

Ch. J. said, it is true that the title of an act of parliament is no part of the law, or enacting part, no more than the title of a book is part of the book: for the title is not the law, but the name or description given to it by the makers: just as the preamble of the statute is no part thereof, but contains generally the motives or inducements thereof, and therefore not necessary to set forth the title or preamble, but generally that at a parliament sessions held such a time, &c. *Enactat' fuit*, though some have been so over-cautious, as not only to set forth the title of the act, but also to do it in English; but sure that is too much caution, and the true way to set it out, if at all, is in Latin; and by setting out the title specially, you tie your justification to an act so intitled, and if you cannot produce one you are gone. And he said, the saying of Hale was sudden (if at all), and notwithstanding his great veneration for his opinion, he could not agree with him. And Gould agreed with the Ch. Justice, tacente Powel, he only declaring, that he had concurred with the rest in C. B. solely upon the opinion of Hale reported in Hard. And upon this exception the plaintiff had judgment.

18. After verdict in an action upon a penal statute made the 6th of the late king and queen, it was moved in arrest of judgment, that the *statute was laid to be made the 12th of November, 6 W. 3.* whereas at that time the queen was alive, and the stile was W. & M. and in regard there was no such stile of the king at that time, for that mistake of the stile the judgment was arrested. Memorandum, the queen did not die till December 28th that year. 2 *Ld. Raym. Rep.* 1224. Hill. 4 Ann. Anon.

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(E. 6) Construction of Statutes.

Affirmative or negative.
See pl. 22.

Affirmative

statutes do not derogate from the common law. Jenk. 24. pl. 46. — Jenk. 212. pl. 49.

As the king may make and appoint sheriffs without an assembly of the judges in the Exchequer *crallino animar'* notwithstanding the statute made at Lincoln 9 E. 2. For this statute is only affirmative. Jenk. 229. pl. 95.

An affirmative law seldom or never works a change in what was before, any otherwise than by addition or confirmation. Parliament Cases, 64. in case of Oldis v. Donmille.

2. It is enacted by 42 E. 3. cap. 11. that pannel in assise shall be arraigned four days before the day of assise, yet if there are two days before the assise, this suffices; for where a statute is in the affirmative (as here) this does not toll the common law. Br. Parliament, pl. 70. cites 43 Aff. 22.

3. So the statute of Westminster 2. cap. 45. is, that a man who recovers may have scire facias of execution after the year, where by the common law by the judgment the record was determined, and if he did not take execution within the year, he was put to a new original; and yet because the statute is in the affirmative, he may take the action which was before at the common law. Br. Parliament, pl. 70. cites 36 H. 6. 3.

Because this statute is in the affirmative, that he may have scire facias after the year, therefore this does not

toll the writ of debt, but that the party may have writ of debt thereof again after the year as at common law. And so he had there; for it was an action of debt brought upon a recognizance, and well, and was not drove to a scire facias. Br. Parliament, pl. 29. cites 36 H. 6. 3.

4. So it is used in trespass of forcible entry, & de malefactoribus in parcis, &c. Br. Parliament, pl. 70.

5. A statute which is in the negative binds the common law, so that a man cannot after use common law; as the statute of Marlebridge, cap. 3. when a lord distrains, the lord shall not therefore be punished by fine; and Magna Charta, cap. 34. that none shall be appealed at the suit of a feme, unless of the death of her husband; contra of statutes in the affirmative. Br. Parliament, pl. 72. cites 10 E. 4. 17.

If a thing is at the common law, a statute, which ought to restrain it, ought to have words in the negative.

As the statute of Marlebridge, which is non-ideo puniatur dominus per redemptionem, and the statute of Magna Charta, et nullus capiatur aut imprisonetur, &c. And so if a statute was made, that it should be lawful for tenant in fee simple to make a lease for 21 years, and that such lease should be good, the statute made so in the affirmative cannot restrain him from making a lease for 60 years; but the lease made for more than 21 shall be good, because it was good by the common law, and therefore to restrain him, it ought to have words negative, as that it shall not be lawful for him to make a lease for above 21 years, or a lease made for more than 21 years shall not be good. And so there is a diversity where a statute makes an ordinance by words affirmative of a thing which was before at the common law, and of a thing which was not before at the common law. Arg. Pl. C. 113. b. Mich. 3 Mar. 1. in the Court of Wards, in Amy Townsend's case.

6. The statute of Marlebridge, cap. 21. and the statute of Westminster 2. cap. 39. are, that after complaint made to the sheriff, he may take the power of his county, and shall make replevin, and per Cur. he may serve process with power by the common law, and the statute in the affirmative is not against it. Br. Parliament, pl. 108. cites 3 H. 7. 2.

Br. Riots, pl. 2. cites 3 H. 7. 1. S. C.

7. Where a statute limits a thing to be in one form, though it be in the affirmative, yet it includes a negative, viz. That it shall not be done otherwise. Pl. C. 206. b. Per Saunders Ch. B. in case of Stradling v. Morgan.

8. Affirmative acts regularly do not toll precedent acts affirmative, unless in certain special cases. 11 Rep. 61. Mich. 12 Jac. Dr. Foster's case. [512]

When an act of parliament is introductive of a

9. A statute in the affirmative, which *introduces a new law*, implies a negative of all that is not in the purview. Hob. 298. Slade v. Drake.

new law in affirmative words, this has the force of negative words. Per Windham. Sid. 56. Mich. 13 Car. 2. B. R. in the case of Withen v. Baldwin.——Where the affirmative statute concerns any thing that was not common law, it implies a negative of all other things. Arg. Show. 30. Hill. 30 and 31 Car. 2. B. R. The King v. Stanton.

Statutes introductive of a new law penned in the affirmative do always repeal former statutes concerning the same matter, as implying a negative. Per Eyre J. Show. 520. Trin. 5 W. & M. B. R. in the case of Harcourt v. Fox.

But an affirmative statute that is in affirmance of the common law does not imply a negative. See Arg. Hard. 18. Mich. 1655. in Scac. The Protector v. Wyche.——Cro. E. 104. Griffith v. Apprice.

10. Customs of London are of such force that they shall stand against negative acts of parliament. See Arg. Lev. 15. Hill. 12 & 13 Car. 2. B. R. in the case of Mayor of London v. Barnardiston.

11. The party's remedy at common law is not taken away by affirmative statutes. Arg. See 2 Show. 30. Hill. 30 & 31 Car. 2. B. R. The King v. Stanton.

Common law. See the pleas above.

12. It is a good exposition of a statute, when the reason of the common law is pursued. 2 Inst. 148.

The surest construction of a statute is by the rule and reason of the common law. Co. Litt. 272. b. To know what the common law was before the making of any statute (whereby it may be known whether the act be introductory of a new law, or affirmatory of the old) is the very lock and key to set open the windows of the statute. 2 Inst. 308.

The best construction of a statute is to expound it as near the rule of the common law as may be. Saund. 240. Pasch. 21 Car. 2. in the case of Thursby v. Plant.——S. P. And by the course which that observed * in the like cases of its own before the act. Per Parker Ch. J. Trin. 1714. Wms's Rep. 252. in the case of Miles v. Williams.——10 Mod. 245. S. C. and S. P.

* S. P. Thus the statute *de donis*, which says, that a fine levied of intailed lands shall be *ipso jure nullus* has been interpreted not to make a nullity but a discontinuance, because at the common law, if a bishop seized in right of his church, or a husband of his wife, had aliened by fine, &c. it was but a discontinuance. Per Parker Ch. J. 10 Mod. 245. Trin. 13 Ann. B. R. in the case of Miles v. Williams, cites 3 Rep. 85. &c.

The general rule in exposition of all acts of parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction, which may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, farther or otherwise than the act does expressly declare; therefore in all general matters the law presumes the act did not intend to make any alteration; for if the parliament had had that design, they would have expressed it in the act. 11 Mod. 150. Hill. 6 Ann. C. B. in the case of Archer v. Bokenham.

Wherever a statute law gives or provides any thing, the common

13. When a statute wills any thing to be done generally, and does not appoint any special mean, it shall be granted according to the course of the common law. Per Manwood Ch. B. Sav. 39. pl. 89. Mich. 24 & 25 Eliz. Anon.

law supplies all necessary remedies and requisites. Arg. Hard. 62. Trin. 1656. in Scacc. in the case of the Protector v. Ashfield.

Whenever an act gives any thing generally, and without any special intention declared, or rationally to be inferred, it gives it always subject to the general control and order of the common law. Arg. See Show. 455. Mich. 5 W. & M. B. R. The King v. the Bishop of London.

14. Statutes that are made in imitation or supply of the common law shall be expounded according to the law. Hob. 97. Trin. 7 Jac. Moore v. Hufsey.

15. It

15. It appears in our books, that in several cases the common law shall control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is *against common right * and reason, or repugnant, or impossible to be performed,* the *common law shall* control it, and *adjudge it to be void,* and therefore in 8 E. 3. 30. a. b. THOMAS GREGOR's case upon the statute of West. 2. cap. 38. & Artic. super Cartas, cap. 9. Herle said, that sometimes statutes are made contrary to law and right, which the makers of them perceiving will not put them in execution. 8 Rep. 118. Hill. 7 Jac. in Dr. Bonham's case.

16. When there is a *particular remedy* given by an act of parliament *in a particular case,* the act shall not be extended to overthrow or *alter the common law* but only in those particular cases. Cart. 36. Arg. in case of Cornwallis v. Hood, cites 11 Rep. 59. Dr. Foster's case, and Hob. 298. Slade v. Drake.

17. An act of parliament *cannot alter by reason of time,* but the common law may. Per Ask. J. Sti. 190. Hill. 1649. B. R. Anon.

18. When an act of parliament *alters the common law,* the meaning shall not be strained beyond the words, except in cases of *publick utility,* when the end of the act appears to be larger than the enacting words. Vaugh. 179. Trin. 16 Car. 2. in C. B. in the case of Bedel v. Constable.

19. When an act of parliament *makes use of a known term in the law* generally, it shall receive the same sense that the common law takes it in, and no other. Arg. 6 Mod. 143. Pasch. 3 Ann. B. R. in the case of Smith v. Harman, cites Hob. 97, 98.

20. A *difference* ought to be observed when a statute is *made to endure for a certain time,* and is *afterwards made perpetual* by a new act, or *made perpetual in part,* and where it is continued with a new addition: for where a statute is made perpetual in part, or in the whole, without any new addition or alteration, the offence may well be supposed against the form of the first statute; for that act is made to continue. Cro. Eliz. 750. pl. 6. Pasch. 42 Eliz. B. R. Dingley v. Moor.

Continuing
former sta-
tutes.

21. If a statute is *made for 7 years,* and after by another act it is *made perpetual,* a declaration ought to be upon the last statute. Arg. Litt. R. 213. Mich. 4 Car. C. B. in the College of Physicians' case.

22. An *affirmative continuance* of a perpetual statute *to a limited time* cannot work an *abrogation* of it. Raym. 397. Trin. 32 Car. 2. B. R. Anon.

23. If a *temporary statute* be made, and before the expiration thereof *another act* is made to continue it for ever in full force to all intents, &c. as if particularly recited, &c. This is all one as if the first act had been made perpetual at first. Lutw. 221. in a nota of the Reporter at the end of the case of Ridley v. Bell.

The statute
of perjury
5 Eliz. was
continued
until the
14th of
Eliz. and

and then it was determined, and 27 Eliz. was revived, yet all informations upon that statute are *contra formam statuti* 5 Eliz. Per Warburton J. Ow. 135. Trin. 9 Jac. in West's case.

Contract or
covenants
affected by
them.

24. If a *parson* has a term, with condition not to alien, and there comes the statute against keeping the farm, yet it seems the condition is good. Arg. 2 Brownl. 142. Pasch. 1611. Portington v. Rogers.

25. Where A. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after, and compels him to do it, the statute *repeals the covenant*; so if he covenants to do a lawful act, and an act of parliament comes in and hinders the doing of it, the covenant is repealed. See D. 27. pl. 278. But if he covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, it does not repeal the covenant; per Holt Ch. J. 1 Salk. 198. Hill. 9 W. 3. B. R. Brewster v. Kidgell.

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26. An act of parliament being *ex post facto*, the construction of the words ought not to be strained in order to *defeat a contract*, to the benefit whereof the party was well intitled at the time the contract was made; per Raymond Ch. J. 2 Ld. Raym. Rep. 1352. East. 10 Geo. in case of Philip Wilkinson v. Sir Peter Meyer.

Contrary to
the words.

27. Exposition of a statute may be *contrary to the general words*. Br. Parliament, pl. 79.

28. *As the prerogative regis, cap. 1. is, that the king shall have custody of all lands and tenements whereof his tenants die seised in fee, yet if the tenant had some land in special tail, and some in general tail, to which 2 persons are heirs, he shall only have that which belongs to the heir general.* Br. Parliament, pl. 79. cites 12 E. 4. 18.

29. *So where part is guildable, and part gavelkind, so that one is heir to the one land, and another to the other land; for the king shall only have that which the heir should have.* Ibid. Br. Parliament, pl. 79. cites 12 E. 4. 18.

That which
law and
reason al-
low shall
be taken to
be in force
against the

30. Some things are exempt and excepted out of the provision of statutes by the *law of reason*, though the words of the statute are contrary. Pl. C. 13. b. Arg. in the case of Reniger v. Fogassa.

words of statutes; per Montague Ch. J. Pl. C. 88. b. Partridge v. Strange.

31. Judges have sometimes expounded the words of an act of parliament merely *contrary to the text*, and sometimes have taken things by equity of the text contrary to the text, to *make them agree with reason and equity*. See Pl. C. in case of Fulmerstone v. Steward.

Equity.

32. Equity is a construction made by the judges, that *cases out of the letter of a statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provides; and the reason thereof is, for that the law-makers could not possibly set down all cases in express terms.* Co. Litt. 24. b.

33. A statute shall not be expounded largely, or by equity to *overthrow an estate*. Arg. 3 Le. 133. pl. 184. Pasch. 28 Eliz. B. R. in case of Wroth v. Countess of Suffex.

15. It

34. It is too general a ground to put cases upon statutes, where things shall be *taken by equity*, but every statute stands upon its particular reason, upon consideration of the parts of the statute, the mischief before, and what things were intended to be remedied by the said statute: so when a statute commences with a *particular enumeration*, no other thing shall be taken by equity; per Jones J. Jo. 422, 423. Hill. 15 Car. B. R. in case of James v. Tintney.

35. An act which is *to take away or clog a remedy which the party has by the common law*, shall not be taken by equity. See 10 Mod. 282. Hill. 1 Geo. 1. B. R. in case of Hammond v. Webb.

36. A statute was made in Ireland, *that all leases that should not be registered by such a day should be void*, the respondent, who lived in the remotest part of Ireland, not having notice of the act of parliament, did not register; whereupon another lease was made to one who had notice of the first, and registered, and judgment brought upon it; but the respondent was relieved; for the *statute which was made to prevent fraud, shall never be used as a means to cover it*. Note, this act of parliament was appointed to be read at every assizes and sessions. MS. Tab. Tit. Statutes, pl. 3. Feb. 22, 1722. Ld. Forbes v. Demiston.

37. For equity to relieve *against the express provision of an act of parliament*, would be the same as to repeal it; and equity will not interpose against it notwithstanding accident or *unavoidable necessity*. MS. Tab. Tit. Statutes, pl. 4. 1723. Sweet v. Anderson.

38. The statute of 9 E. 3. cap. 5. is, *that the executor who first comes shall answer*, yet it is put in use that *he who comes by capias, shall answer*; quod nota. And this seems to be by an equity. Br. Parliament, pl. 24. cites 4 H. 6. 14.

39. Where the *statute de religiosis makes recovery by default to be Mortmain*, recovery by *reddition, by confession or action tried is taken by equity*; per Jenny: quod non negatur. And per Laicon, the statute extends to *rent and common*, which is not land or tenement; quod non negatur, scil. the statute of Mortmain. Br. Parliament, pl. 50. cites 3 E. 4. 14.

40. Attaint cannot be taken *by the equity*, because it is *penal*, and attainments never were taken by equity; for first, the *statute gave attaint in plea real*, and the *plea personal was not taken by equity*, but after it was given in plea of trespass by another statute where the damages passed 40s. and after the attaint was given of the damages as well as of the principal; and therefore see that it was not taken by any equity. Br. Parliament, pl. 20. cites 14 H. 7. 13.

41. Where the *statute of Gloucester is of warranty and assents by the tenant by the courtesy*, the warranty lineal with assents to bar the tail is by the equity. Br. Parliament, pl. 20. cites 14 H. 7. 13.

42. In scire facias the best opinion was, that *scire facias to execute a fine of lands intailed by the fine shall be brought against the*

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Extended
by equity,
&c. beyond
the words.
See pl. 95.
to 100.

the parrour of the profits by the equity of the stat. of formedon in descender, and remainder against parrour 1 H. 7. and the stat. of quod ei deforcat is, that the plaintiff may vouch ac si esset tenens in priori breve, yet he, who cannot vouch in priori breve, shall have quod ei deforcat, as he who loses by default in scire facias or in writ of entry in the quibus against the disseisor. Br. Parliament, pl. 21. cites 14 H. 7. 17.

43. And the statute of Gloucester is, that the plaintiff shall recover damages against every one who is found tenant after the disseisin, and writ of intrusion is taken by the equity; per Wood J. contra in action which supposes title, as dum fuit infra ætatem, & non compos mentis, &c. Br. Parliament, pl. 21. cites 14 H. 7. 17.

44. And the statute of Westminster 2, which gives cui in vita, where the baron loses by default, is, that a woman after the death of her husband shall recover, &c. and by the equity thereof cui ante divortium is taken to be in the life of the husband. Br. Parliament, pl. 21. cites 14 H. 7. 17.

S. P. Br.
Parliament,
pl. 20. cites
14 H. 7. 13.

45. Such statutes as give remedy, which was not a common law, shall be taken by equity, as writ of entry in casu proviso is given by the statute of Gloucester, cap. 6. And by the equity of this statute a man shall have a writ of entry in consimili casu. Kelw. 96. a. pl. 6. Mich. 22 H. 7. Anon.

Co. Litt. 77.
a. S. P.

46. The words of the statute of 13 Eliz. of fraudulent grants, &c. are, be it therefore declared, ordained, and enacted, &c. and therefore like cases in semblable mischief shall be taken within the remedy of this act by reason of this word (*declared*), whereby it appears what the law was before the making of this act. Co. Litt. 290. b.

S. P. Co.
Litt. 268. b.
—Acts
made in
prevention
of fraud or
suppression

47. All statutes made to redress fraud and to give a speedier remedy for right, being in advancement of justice and beneficial to the publick shall, for that reason, be extended by equity. See Pl. C. 59. b. in the case of Wimbish v. Talboys.

of it ought to have a favourable construction. See 5 Rep. 60. Mich. 32 & 33 Eliz. B. R. in Gooch's case.—See 5 Rep. 77. b. in Booth's case, S. P.

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48. Clergy is denied in the case of burning of dwelling-houses by the equity of the statute of 23 H. 8. cap. 1. and in the case of provisors upon the statute of 27 E. 3. cap. 1. For these are statutes for the publick good; and therefore shall be taken by equity. Jenk. 101. pl. 97.

49. Beneficial statutes have always been taken and expounded by equity ultra the strict letter, but not contra to the letter. Arg. Mo. 508. Mich. 37 & 38 Eliz. in the Lord Buckhurst's case.

50. Acts made for publick convenience, as the New River Water Act, ought to have a liberal construction; and though it mentions the city only, shall extend to places adjacent, &c. 2 Vern.

431. New River Company v. Graves.

Extended by
equity, &c.
to persons
not named.

51. Where the statute of Westminster 1. cap. 46. is, that for the nonage of the heir of the disseisee or the heir of the disseisor the parol shall not demur where fresh suit is made, and writ of entry

entry in the *per & cui* was brought against the heir of the heir of the disseisor, and because he is heir also to the disseisor, though he is not heir immediate, and also fresh suit was proved, &c. therefore he was ousted of his age; quod nota. Br. Parliament, pl. 22. cites 24 E. 3. 25. 46.

52. Where it is given by the *statute of Westminster 2. cap. 11.* that a man shall have action of debt upon escape of a man condemned against the gaoler, the action does not lie against the executor of the gaoler; for this is out of the case of the statute, and also is penal; and there is also a statute thereof 1 R. 2. cap. 12. Br. Parliament, pl. 80. cites 41 Ass. 15.

53. By the *statute of Westminster 2. cap. 11. de servientibus, ballivis, &c.* that if a bailiff be found in arrear in an action of account, and committed to ward, and the warden permits him to escape, debt lies against him of it, and by the equity debt lies against every other warden upon every other condemnation in other action; per Choke & Pigot. Br. Parliament, pl. 19. cites 15 E. 4. 20.

A statute which speaks of one person or officer of a place certain shall be extended by equity to others, as

where the statute of 1 R. 2. 12. gives action of debt against the Warden of the Fleet, it shall be extended to other gaolers and officers. Arg. Pl. C. 36. in the case of Platt v. the Sheriff of London.

54. *Warranty of tenant for life* is by the equity of the statute, which speaks of the warranty of tenant by the curtesy. Br. Parliament, pl. 20. cites 14 H. 7. 13.

55. When the words of a statute enact a thing, it enacts all other things which are in like degrees; as where a statute mentions * executors, it shall extend to administrators; so where a statute gives action of waste against tenant for life or years, by the equity of this statute the action lies for tenant for half a year, or less, &c. See Pl. C. 467. a. in the case of Eyston v. Studd.

* Where trespass is given to executors for goods carried away in the life of the testator, administrators are taken by the equity.

Br. Parliament, pl. 20. cites 14 H. 7. 13.

56. Where an act of parliament says, *justices of peace of such a division* shall do so and so, it is only *directory* quoad the division; and any of the justices of the county may do it. Per Holt Ch. J. 12 Mod. 546. Trin. 13 W. 3. B. R. Anon.

57. When an act of parliament makes a new law, and makes a crime felony, that was not so before, though there be not a word of *accessary*, yet they shall be felons. Per Gould J. Far. 131. Hill. 1 Ann. B. R. in case of the Queen v. Whistler, cites Palm. 141.

58. A statute that says no scire facias shall be sued out upon any bond in which the penalty was not taken to the king, his executors and administrators, yet a bond taken to his heirs and successors is good; for the statute is only *directory*. MS. Tab. Statutes, pl. 2. Dec. 4, 1721. Yale v. King.

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59. Where a statute shall be construed to extend to executors, &c. and other persons not named therein. See Co. Litt. 293. a. And see Ibid. 54. b.

60. Where

Exceptions.
* Br. Chal-
lenge, pl.
170. cites
S. C.

60. Where the statute of 15 H. 6. cap. 5. is, that a juror in attaint shall expend 20l. per annum, unless in cities and boroughs, and because the *exception is general*, this shall be intended as well of cities which are counties in themselves as others. Br. Parliament, 59. cites * 12 E. 4. 13.

Explanatory.

61. Of the construction of *exceptions in an act of indemnity* of 27 Eliz. See And. 131.

3 Rep. 31. a. accordingly, by Wray Ch. J. in BUTLER AND BAKER'S CASE;

62. *Statutes of explanation shall be construed only according to the words, and not with any equity or intendment*; for there cannot be an explanation upon an explanation, as it was held in 3 Rep. in BUTLER AND BAKER'S case; and Jones said it was so resolved 43 Eliz. in the Court of Wards, by the opinion of the Chief Justices. See Cro. C. 33. pl. 6. Pasch. 2 Car. a case out of the Court of Wards. Anon.

for if any exposition should be made against the direct letter of the exposition made by parliament, there will be no end of expositions.——And. 349. S. C.——And see Jo. 344, 345. Trin. 15 Car. B. R. James v. Tintney.

It must be construed precisely, and no new interpretation can be made of it; per Hutton J. Win. 85. in case of Hickford v. Machin, cites Butler and Baker's case.——S. P. Arg. Jo. 35. in case of Godfrey v. Wade, cites S. C. of Butler and Baker.

When one act is made explanatory of another, the *Court cannot carry the explanation farther* than is expressed in that act, but in an original statute the Court will make construction according to equity. Per Cur. Carth. 396. Dalbury Parish v. Foston.——Comb. 410. Hill. 9 W. 3. B. R. S. C. and S. P.——S. P. Poor's Settlements, 89. pl. 121. in case of the Parish of Burclear v. East Woodhay.

Hobart Ch. J. denied that statutes of explanation shall always be taken literally; for it is impossible that an act of parliament should provide for every inconvenience which happens. Winch. 123. Hill. 22 Jac. C. B. in case of Hilliard v. Sanders.——S. P. Per Hobart. 2 Roll. Rep. 500, 501.

But where the statute of explanation is *doubtful*, it may have such exposition as shall be taken to stand with the *scope and intention* of the act, and which shall be *reasonable*. See Jo. 35. 38, 39. Trin. 21 Jac. C. B. Godfrey v. Wade.——They are always interpreted beneficially. Arg. 3 Rep. 75. in Dean and Chapter of Norwich's case.

63. An *explanatory act* implies a negative of any thing else. Arg. 2 Salk. 534. in the case of the Queen v. Inhabitants of Buckingham.

General or particular.

64. *Statutum speciale speciali statuto non derogat* unless there are express words of abrogation. Jenk. 198. pl. 11.

65. If an act of parliament is made that all bishops or other justices, or all sheriffs, &c. shall do such an act, or shall have such benefit, this act is called an act *particular in a generality*, or general in a particularity, and must be pleaded, because it goes not against or for all the king's subjects in general. Pl. C. 65. Per Mountague Ch. J. in case of Dyve v. Maningham.

Where the words are special, but the reason general it is to be construed generally.

66. Acts *general in words* have been *construed to be but particular*, where the *intent* was particular. See Saunders Ch. B. See Pl. C. 204. in case of Stradling v. Morgan.

67. Judges have always expounded *general* statutes according to the rules of the common law. 3 Rep. 13. b. in Herbert's case.

68. A *general law* does not make that good which was *disabled by a particular statute* before. Arg. and admitted by the other side.

side. Roll. Rep. 202, 203. Trin. 13 Jac. B. R. in case of Long v. Baker.

* 69. *Particular* statutes shall not go beyond the words, but *general* statutes which are for the benefit of the commonwealth shall be *construed* largely, and by equity. Arg. Litt. Rep. 247. Pasch. 5 Car. C. B. in the case of the College of Physicians v. Butler.—Cites 12 E. 4. 20.

70. It is *not unusual* in acts of parliament, especially in the more ancient ones, to *comprehend* by construction a *generality*, where express mention is made only of a *particular*, this particular being taken only as instances of all that want redress in the kind whereof the provision is made, and so it extends generally; as, the statute of circumspecte agatis de negotiis touching the Bishop of Norwich, extends to all bishops, cites Fitzh. Prohibitions 3. and 2d inst. upon the exposition of that act. So 25 E. 3. cap. [7] enables the incumbent to plead in quare impedit at the suit of the king, yet this is extended also to the suit of all persons, cites 38 E. 3. 31. So the act of 1 R. 2. [cap. 12.] ordains, that the Warden of the Fleet shall not permit prisoners in execution to go out of the prison by bail or baston, yet it has been adjudged that this act extends to all gaolers, cites Pl. C. Platt's case. See 2 Jo. 62. Mich. 28 Car. 2.. B. R. in the case of Plummer v. Whichcot.

71. General words in an act may be *qualified by subsequent sentences* or clauses in the same statute. Per Cur. 8 Mod. 8. Mich. 7 Geo. 1721. The King v. Archbishop of Armagh. *But no subsequent words shall control the general words in the enacting part.* Per Cur. 8 Mod. 39. Pasch. 7 Geo. 1721. The King v. Rufford Parish.

72. Where a statute *prohibits* any thing, but limits *no penalty*, the party offending may be indicted as for a contempt against the statute. Cro. E. 655. Hill. 41 Eliz. B. R. Crouther's case. *Inforced bow.*

* If it be a thing of publick concern; per Twisden J. Mod. 34. Crofton's case. Ibid. 233.—An action lies for doing against the prohibition; but that ought to be by action, *sam pro rege quam pro seipso.* Cro. J. 134. Waterhouse v. Bawde.

73. Where an act prohibits or *commands* the doing of a thing for the advantage of any person, such person, if injured by a disobedience to that law, is intitled to an *action*, though the statute does not expressly give one. Arg. Parl. Cases, 122. cites 2 Inst. 55. 74. 118. 131. *10 Rep. 79. a. b. in the case of Marshalls, —Per Coke Ch. J. 3 Bull. 115.*

in cases where the judges cannot otherwise aid the party grieved.

74. Whenever a statute *makes a thing criminal*, an *information* will lie upon the statute, though not given by express words. Mod. 6. in Troy's case. *An indictment will not lie; per a justices against Holt*

Ch. J. 4 Mod. 146. Trin. 4 W. & M. B. R. The King v. Marjot,

75. Where an act of parliament gives a *particular penalty*, the party shall not be punished by *indictment*, 6 Mod. 86. Mich.

2 Ann. B. R. said to have been so resolved in the case of the Queen v. Watson, and also in one Castle's case.

When a statute appoints a penalty for the doing a thing which was no offence at common law, and appoints

76. Where a statute introduces a new law, and inflicts a new punishment, it must be followed; but where an act of parliament only inflicts a new punishment for an old offence at common law, it remains an offence still punishable as it was before the act. So it is in the case of forgery, which notwithstanding the 5th Eliz. remains still punishable as it was before that statute. Per Raymond Ch. J. Gibb. 66. Pasch. 2 Geo. 2. B. R. in the case of the King v. Woolston.

how it shall be recovered, it shall be punished by that means, and not by indictment; per Cur. Cro. J. 643, 644. pl. 4. Mich. 20 Jac. B. R. Castle's case.—S. C. cited and admitted, 2 Show. 30, 31. Hill. 30 & 31 Car. 2. B. R. in the case of the King v. Stanton.—See S. P. Arg. Lane 106. Hill. 8 Jac. in the Exchequer in the case of Kitchin v. Calvert.—S. P. But contra of an offence at common law, for which an act gives a new penalty or remedy; for there the remedy at common law is not taken away without negative words; per Cur. 10 Mod. 337. Trin. 2 Geo. 1. B. R. The King v. Dixon.

If the act says, that the penalty shall be recovered by bill, plaint, &c. and not otherwise, an indictment will not lie, but that is because of the negative words; per Twilden J. and Keeling, who before held otherwise. Mod. 34. Hill. 21 & 22 Car. 2. B. R. Crofton's case.

77. Where an act of parliament gives a penalty to the king for doing such an act, and does not make it an offence indictable, the party ought to be sued in the Exchequer for the penalty as for a duty vested in the crown; but is not therefore indictable. Gibb.

Intent. See 89 to 94.
Br. Presentments in Courts, pl. 16. cites S. C.

47. Hill. 2 Geo. 2. The King v. Manning.

78. The statute which says, that presentments taken before the sheriff in his torn shall be returned before justices of peace, and they shall make process upon it, this is intended of things whereof the sheriff may lawfully inquire in his torn by the common law. Br. Parliament, pl. 53. cites 4 E. 4. 31.

79. The act of the feme who consents to the ravisher by 6 R. 2. cap. 6. is intended of free consent, and not for terror, doubt, or duress, quod nota the reasonable intendment thereof. Br. Parliament, pl. 55. cites 5 E. 4. 6.

80. Every thing which is within the intent of the makers of the act, though not within the letter, is as strongly within the act, as that which is within the letter, and the intent also. Pl. C. 366. b. in Lord Zouch's case.

All acts of parliament as well private as general shall be taken by reasonable construction to be collected

81. The words of statutes are not to be considered only, but rather the intent of the matter is to be weighed; for many times things which are within the words of statutes are not within the purview of them, which extends no further than the intent of the makers, which is the principal thing to be considered. Per Cur. Pl. C. 464. a. b. Pasch. 15 Eliz. in the case of Eyston v. Studde.

out of the words of the act itself according to the true intention and meaning of the makers of the act. See 5 Rep. 5. a. Mich. 31 & 32 Eliz. B. R. Lord Mountjoy's case.

The intent of a statute will aid the obscurity of the words in the construction of the words themselves. See Pl. C. 53. in the case of Wimbish v. Talbois.

The intent of the act is always to be regarded, and to such purpose only the words ought to be construed; per Brown J. Pl. C. 231. Willion v. Berkley.—Ibid. 464. Eyston v. Studde.—Plowden compares the words of the law to the shell of a walnut and the sense to the kernel in which is the profit. 465. ibid.—The intent ought to be found partly from the words, and partly from the mischief they intend to remedy. Arg. Litt. R. 212. Mich. 4 Car.

in the College of Physicians' case.—S. P. Litt. R. 247. Pasch. 5 Car. in B. C.—Constructions are to be made of the whole acts according to the intent of the makers, and so sometimes are to be expounded *against the letter to preserve the intent*. Per Eyre Ch. J. Show. 491. cites 3 Rep. 59. and Jo. 105.

The intent of the makers may be collected from the cause or necessity of making the act or by the words in other parts of the act, or by foreign circumstances, and the construction should be consonant with reason and discretion. Pl. C. 205. Per Saunders Ch. B. in the case of Stradling v. Morgan.

The reason that induced the law makers to make such acts to take away the common law may be, and is usually urged in making construction of them; therefore in doubtful cases we may enlarge the construction of acts of parliament according to the reason and sense of the law-makers expressed in other parts of the act, or guessed by considering the frame and design of the whole; Per Trevor Ch. J. 11 Mod. 161. Hill. 1707. in the case of Archer v. Bokenham.

82. In acts that are to be construed according to the intent and meaning of the makers of them *the original intent* and meaning is to be observed. 11 Rep. 73. b. Pasch. 13 Jac. Magdalen College case.

83. Even in *penal laws* the intention of the legislators is the best method to construe the law; per Cur. 8 Mod. 65. Hill. 8 Geo. 1722. in the case of the King v. Gage.

84. Where there are *two statutes made together*, and the one *contrary to the other*, reasonable construction shall be made. Br. Parliament, pl. 9. [520]

As by the statute of Westm. 2. cap. 3. That where the baron makes default in reddition, the feme shall be received, &c. And the same statute, cap. 25. wills. that if any in assise vouch record and fail, he shall be adjudged for a disseisor without taking of the assise; and yet in assise against baron and feme, who vouch record and fail, and at the day the baron makes default, the feme may be received. Br. Parliament, pl. 9. cites 7 H. 4. 16.

When *two acts seem to cross one another*, such construction shall be made that both shall stand together. MS. Tab. 21 Jan. 1710. tit. Forfeiture. Horton v. Hinton.

85. When *two statutes cross one another*, and no clause of *non obstante* is contained in the 2d statute; so that the one may stand with the other, the exposition ought to be that both stand in force; per Dyer Ch. J. D. 347. b. pl. 12. Hill. 18 Eliz. Weston's case. S. P. Arg. Roll. R. 154. pl. 1. in case of Warden v. Smith.

86. If *laws and statutes seem contrary to one another*, yet if by interpretation they may stand together, they shall stand; per Doderidge J. who said it is a rule in law. Roll. R. 91. pl. 41. Mich. 12 Jac. B. R. in case of the King v. Dr. Foster.

87. Upon all acts of parliament there must be such a construction made, as that *one clause may not frustrate and destroy another*. Hard. 344. pl. 1. Hill. 15 & 16 Car. 2. in Scacc. in case of Stevens v. Duckworth.

88. By Powel J. if there are *two acts of parliament directly contrary to one another the same sessions*, the last shall only be taken for law. But per Holt Ch. J. if they should both generally refer to the same sessions, I do not know which to take for law. 6 Mod. 287. Mich. 3 Ann. B. R. in case of St. Clement's v. St. Andrew's Parish.

89. Where the terms and letter of a statute are obscure and difficult to be understood, we must resort to the *intent* of the makers. See Pl. C. 57. b. in case of Wimbish v. Tilboys. Obscure or Doubtful.

90. When *one branch is obscure* in an act of parliament, expositors used to examine the other branches; for oftentimes by the intent

intent of one clause the sense of the other may be known. Pl. C. 365. in Lord Zouch's case.

91. *Obscure* statutes ought to be interpreted according to the rules of the common law; per Winch J. Win. 86. in case of Hickford v. Machin.

But if usage
be against the
obvious
meaning of
an act of
parliament,
by the
vulgar and
common

92. Where the penning of a statute is dubious, *long usage* is a just medium to expound it by; for *jus & norma loquendi* is governed by usage; and the meaning of things spoken or written must be as it has constantly been received to be, by common acceptance; per Vaughan Ch. J. Vaugh. 169. Hill. 23 & 24 Car. 2. C. B. in case of Sheppard v. Gosnald & al.

acceptation of the words, then it is rather an oppression of those concerned than an exposition of the act, especially as the usage may be circumstanced. Vaugh. 170. in S. C.

93. Where an act of parliament is *dubious*, the consequences are to be considered, and care is to be taken that such an interpretation be not put upon it as will quite elude the force of it: but where it is *plain*, the consequences are not to be regarded; for that would be to assume a legislative authority. Arg. 10 Mod. 344. Mich. 3 Geo. B. R. in case of the Queen v. Simpson.

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Pardon.

94. In a *pardon* of the king by authority of parliament, every word shall be taken and construed most strongly against the king. Kelw. 168. pl. 1. Mich. 10 H. 8.

Penal sta-
tutes.

See pl. 38
to 51. 78 to
84. 116. 124
to 13.

*95. It was said by Horton, that a *statute penal*, as the statute of provision, &c. shall be taken *stricti juris*; but a statute made for common remedy for † general mischief, may be taken by equity. Br. Parliament, pl. 13. cites 11 H. 4. 76.

It is a principle in the common law, that statutes *penal* shall be taken strictly, and not extended by equity in their prejudice, against whom the pain is inflicted; but on the other side there are several cases where the *general words* shall be restrained and abridged, for the benefit of him against whom the penalty is inflicted. See Pl. C. 17. b. in the case of Reniger v. Fogassa.

Penal laws are not always taken strictly, but sometimes by equity. Arg. See 2 Brownl. 117, 111. 116. in case of Cross v. Westwood.—See Pl. C. 86. b. in case of Partridge v. Strange.—Ibid. 124. in case of Buckley v. Thomas.

Penal statute being made for the publick service, and good of the king and realm, as the statutes that make soldiers running away *felony*, may well be taken liberally according to the intent of the makers. Cro. C. 71. The Soldier's case.—So may a *penal statute which is to prevent a general mischief*, as 1 R. 2. cap. 12. against escapes by Warden of the Fleet 2 Brownl. 302. Arg. in the Duke of Lenox's case, cites Pl. C. Platt's case.—For though it is penal against the warden, yet it is beneficial as to all others, and for that reason shall be taken by equity; for every statute is penal against somebody; but since the taking it by equity will be more beneficial than prejudicial to the greater number of people; therefore by the rules of law it may be extended by equity. See Pl. C. 36. b. Platt v. the Sheriffs of Lond. n.

Chancery will aid *remedial laws*, though they are called penal, but not by making them more penal, but to let them have their course: per Lord Wight. Ch. Prec. 215. Hill. 1702. in case of Attorney General for Hindley v. Sudell, Hesketh & al.

The rule that *penal laws* shall not be taken or construed by equity, holds in cases of laws that are *penal upon particular persons*; but not if made for the publick good, and the peace and safety of the realm. Arg. 10 Mod. 242. Pa. ch. 13 Ann. in the House of Lords, in case of Roper v. Ratcliff.

† S. P. Though it be a penal one. Arg. 10 Mod. 117. in case of Fleetwood v. Thornaby.

96. Every statute which is *penal*, and which goes in *derogation of the common law*, shall be taken strictly, and this is a common saying; and a penal statute is such as gives corporal pain, as imprisonment

prisonment or forfeiture of money. Keilw. 96. pl. 6. Mich. 22 H. 7. Anon.

97. Although a penal statute shall not be extended to equity in the exposition of it, yet it shall be so expounded *that the true intent and meaning of it may be known.* (Mich. 1650. B. S.) For if the former should be, the exposition would be too large and arbitrary; and if the latter should not be, the exposition would be too narrow, and would extenuate the force of the statute, and hinder the true intent and meaning thereof. 2 L. P. R. 527. Tit. Statute.

98. A *penalty* in an act of parliament *implies a prohibition*, though there are no prohibitory words in the statute; per Holt Ch. J. Carth. 252. Mich. 4 W. & M. B. R. in case of Bartlett v. Viner. As in the case of simony, the statute only inflicts a penalty by

way of forfeiture, but does not mention any avoiding of the simoniacal contract, yet it has been always held that such contracts being against law, are void. So if a scrivener contracts for more than 5s. for procuring the loan of 100l. such contract is void; per Holt Ch. J. Carth. 252. in case of Bartlett v. Viner.——Skin. 322. S. C.

99. The statute of *Marlebridge* 52 H. 3. 23. of waste, is a penal law, and yet because it is a remedial law, it has been interpreted by equity. That act says, *firmarii non faciant vastum*; and it has been resolved that the word *firmarii* should extend to *strangers*, and that this act extended to waste *omittenda*, though the word is *faciant* which literally imports *active* waste. Arg. See 10 Mod. 282. Hill, 1 Geo. 1. B. R. Hammond v. Webb.

100. The *preamble* is a * *key* to open the minds of the makers, and the mischiefs they intend to remedy; per Dyer Ch. J. Pl. 369. in case of Stowel v. Zouch.

Preamble.

* S. P. Co. Litt. 79. a.

The *preamble* is not a guide to *expound* statutes always; per three justices. Jo. 164. Mich. 3 Car. B. R. in case of Barker v. Reading.

It is no rule in the exposition of statutes to confine the *general words* of the *enacting part* to any particular words, either introducing it, or to any such words even in the *preamble* itself: it is true, my Lord Coke commends a construction which agrees with the preamble, but not such as may *confine* the enacting part to it. Per Cur. 8 Mod. 144. Trin. 9 Geo. in case of the King v. Althoes. [522]

Lord Ch. Cowper said, that he could by no means allow the notion that the preamble shall *restrain the operation of the enacting clause*; and that because the preamble is too narrow or defective, therefore the *enacting clause*, which has *general words*, shall be restrained from its full latitude, and from doing that good which the words would otherwise, and of themselves import, which (with some heat) he said, was a ridiculous notion, and instanced in the Coventry Act, which, if it had recited the barbarity of cutting Coventry's nose, and the enacting clause had been general, viz. Against the cutting of any member where the man is disfigured or defaced, it might with equal reason be objected, that the cutting off the lips, or putting out the eye, would not have been within the act, because not within the preamble. Wms.'s Rep. 320. Trin. 1716. in case of Copeman v. Gallant.

101. There was a time when there was no preamble to acts of parliament, and yet they were good, and even now *preambles* are no more than recitals of inconveniencies, which do not exclude any other to which a remedy is given by the enacting part: per Cur. 8 Mod. 144. Trin. 9 Geo. in case of the King v. Althoes. There were few or no preambles to acts of parliament before E. 8. when rarely the Commons were

mentioned in the act, and seldom the Lords, and yet as may appear by the rule of summons to the parliament, they were all there present. D. 144. b. Marg. pl. 60.

Prescription. 102. My Lord Coke in his book on Littleton, takes a difference between *negative statutes declaratory of the common law*, and *negative statutes introductory of a new law*; but Richardson Ch. J. and Noy. Attorney General, held against Lord Coke's opinion, that in neither of the cases a *prescription* can be against a negative statute. Jo. 270. 8 Car. in Itin. Windsor Lord Lovelace's case.

But Jo. 289. 290. 8 Car. Itin. Windsor, in the case of the tenants of the manor of Bray is contra in support of Co. Litt. 115. a. That against the last there is no prescription, but in the first case no alteration is made, and therefore a prescription may as well be against that as the common law, and that is the reason that a man may prescribe to hold a leet more than twice in the year, though the statute of Magna Charta be negative, that a leet be holden only twice, &c. Arg.

A man may *prescribe against an affirmative statute*, but not against one that is in the negative. See Arg. a Bull. 36. in case of James v. Smith.

Arg. Show. 103. All *prescriptions and customs* will be foreclosed by a new act of parliament unless saved. Parliament Cases 175. in case of the Bishop of London and Dr. Birch v. the King.

Provisoes. 104. In all cases of statutes which are with *provisoes* the law upon them shall be taken generally, but in such particulars only as are restrained by the proviso. Arg. 3 Le. 132. pl. 184. Pasch. 28 Eliz. B. R. in case of Wroth v. the Countess of Suffex.

105. Where the *proviso* of an act of parliament is *directly repugnant to the purview*, the proviso shall stand, and be a repeal of the purview, as it speaks the last intention of the makers. Gibb. 195. Hill. 4 Geo. 2. B. R. Attorney General v. Chelsea Water-works' Governors.

Reference. 106. Where the *prærogativa, cap. 1. wills that the king shall have the lands and tenements of his tenant, who dies seised, his heir within age, &c. except the possessions of the Archbishop of Canterbury between Tine and Tees*, this shall be intended of possessions which the Archbishop then had, and not those which shall be purchased or escheat after; quære of escheats. Br. Parliament, pl. 83. cites 16 E. 3. and Fitzh. Livery 29.

Br. Parliament. 107. If *action of waste be now given generally against tenant in tail after possibility of issue, &c.* treble damages shall be recovered against him without more words; for those are adjoined to it by the former statute. And when it is given in a new case, all that is adjoining to it is given with it likewise. Br. Waste, pl. 68. cites 12 H. 4. 3.

[523] 108. In construction of general references in acts of parliament, such *reference* must be made only *as may stand with reason and right*. 2 Inst. 287.

Statutes made in pari materia are to be taken into 109. An act lately made shall be taken *within the equity of an act made long since*. See 4 Rep. 4. a. Mich. 14 & 15 Eliz. Vernon's case.

the construction of one another. Barnard. Chan. Rep. 276. Hill. 1740. in case of WALLIS v. HARRISON, cites it as the opinion of Ld. Ch. J. Hale in 1 Vent. 244. and that the statute of 14 Eliz. relating to church leases was a kind of appendix to 19 Eliz. relating to the same matter. And says, the Ld. Chancellor held, that in the principal case, which was upon the statute 1 Jac. 2. cap. 17. S. 7. this rule of construction holds more strongly, this statute being a continuance of the statute

statute of [22 & 23 Car. 2. cap. 10.] of distributions; for the statute 1 Jac. 2. is a continuance of that of Car. 2. with three additional clauses, and therefore is to be considered as if the statute of Car. 2. was repeated, and re-enacted by it. — See Vent. 246. Baily v. Murin.

So the statute of 13 E. 1. de Mercatoribus shall be construed within the statute of Aston Burnel 12 E. 1. as to selling land at a reasonable price. [See (E. 12.) statute 13 E. 1. the notes upon the words (reasonable extent.)]

Though a subsequent statute may be comprehended within the meaning of the act precedent, as the statute of 32 H. 8. of wills within the statute 27 H. 8. of jointures, yet that is when the later statute is within the same reason as the former. Per Holt Ch. J. 2 Ld. Raym. Rep. 1028. Hill. 2 Annæ in Sir William Moore's case.

110. When a thing is named certain, and after general things, the word subsequent shall be referred to the general words, and not to that which is certain. Arg. Le. 239. Mich. 32 & 33 Eliz. B. R. in Guildford's case.

Where a thing is given or limited by a statute in particular,

this by general words of the statute shall not be tolled. Per Hutton J. Jo. 26. Hill. 20 Jac. C. B. in case of Standen v. the University of Oxon and Whitton.

111. Always in statutes relation shall be made according to the matter precedent. 6 Rep. 76. b. Pasch. 5 Jac. in the Court of Wards, Sir Geo. Curson's case.

112. Relative words, in an act of parliament, will make a thing pass as well as if it had been particularly expressed in the act itself. Raym. 54, 55. Mich. 14 Car. B. R. in case of Wheatly v. Thomas.

113. A thing, which has no existence but by a late act, may receive benefit from a former act by an equitable construction. See 2 Jo. 63. Mich. 26 Car. 2. B. R. Plummer v. Whitchcott.

114. When a remedy is given by a statute, and no action is given by the same statute for recovery of the penalty, the party shall have an action of debt; per Jones J. Poph. 175. in case of Welden v. Vesey.

Remedy.

115. Wherever a statute enacts or prohibits any thing for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy unless in equity. Per Holt Ch. J. 6 Mod. 26. Mich. 2 Ann. B. R. Anon.

Ibid. 33 in case of Ashby v. White

116. General words in penal statutes are often restrained by equity; as if an act says that whoever does such an act shall be a felon, and suffer death, yet this extends not to persons non sanæ memoriæ, or infants very young. So if a statute makes all receivers, or who shall give meat or drink, &c. to persons guilty of such or such offence to be accessaries, if they are conscious of the fact, yet this will not be construed to extend to the wife of such guilty person, though the generality of the words extended to infants, non sanæ memoriæ, and wife, yet they are not included in the intent. See Pl. C. 465. a. &c. and many more illustrations and examples there. Pasch. 15 Eliz. in the case of Eyston v. Studd.

Restrained by equity, &c.

117. Though the statute of 1 Eliz. makes void all leases by bishops, &c. to all intents and purposes, yet such a lease is not void against

against the lessor himself. Arg. Mo. 315, 316. pl. 455. cites it as adjudged Mich. 33 Eliz. in the case of Sale v. Bishop of Litchfield.

* 118. Lands are *disgavelled* by act of parliament to all intents and purposes, and made descendible as lands at common law to the eldest son only. The generality of the first words are *restrained by the particular conclusion*; and adjudged that this only takes away the partability of the lands, and not the power to devise. Lev. 80. Mich. 13 Car. 2. B. R. Wiseman v. Cotton.

119. Though the words of an act are general, yet they ought to be specially construed *to avoid an apparent injury*. Arg. 8 Mod. 7. Mich. 7 Geo. in case of the King v. the Bishop of Armagh.

120. There are many cases of *instances or examples* given in acts of parliament, *which yet do not restrain the remedy or purview to that particular*, or from extending to other cases of the like nature. Went. Off. Executors 67. upon stat. 4 E. 3. 7. De Bonis Asportatis, &c.

Retrospect.

121. It is a rule and law of parliament, that regularly *nova constitutio futuris formam imponere debet, non præteritis*. 2 Inst. 292.

2 Jo. 108. S. C. upon the construction of the statute

122. A new act has *no retrospect* to take away an action to which the plaintiff was intitled before the commencement thereof. 2 Mod. 310. Trin. 30 Car. 2. B. R. Gilmore v. Shooter.

29 Car. 2. against frauds and perjuries as to actions for marriage-promises, without note or writing after the 24th June, &c. — 2 Lev. 227. S. C. — Vent. 330. S. C. — 2 Show. 16. S. C.

123. Statutes may have a *retrospect*. 10 Rep. 55. Trin. 11 Jac. Chancellor, &c. of Oxford's case, and cites Pl. C. 207. a. the case of Stradling v. Morgan, upon the statute 31 H. 8. cap. 13. which gave the possessions of abbies to the king in the same estate as then they were; and D. 231. Mich. 6 & 7 Eliz. the abbot of Ramsey's case, and the statute 13 Eliz. cap. 4. which subjected the lands, &c. of treasurers and persons accountable to the queen, to the payment of their debts; and Sir Christopher Hatton's case resolved upon the said statute.

Strictly.

See pl. 12. 10 20. 33 10 51. 62. 63. 95 to 100.

124. *Affise against baron and feme, who pleaded record in bar, and failed at the day*, and yet the feme was received, and was not a disseisor by the failer of the record, notwithstanding the statute of Westm. 2. cap. 25. which wills that he be adjudged for a disseisor without taking the affise. And so see that statutes are *taken by reasonable construction*, notwithstanding strict words. Br. Parliament, pl. 31. cites 13 Aff. 1.

125. Upon the statute of Westminster 2. cap. 40. it was said, that *statutes which restrain the common law, shall be taken strictly* juris. Br. Parliament, pl. 72. cites 18 E. 4. 16. and 21 H. 7. 21. Per Cur. that the statute of Westm. 1. cap. 20. *de Malefactoribus in parcis & vivariis, shall not extend to forests*; quod nota.

126. *Where the plaintiff in quod ei deforceat vouches, he who is vouched cannot vouch over*; for in this point the statute is strict. Br. Parliament, pl. 21. cites 14 H. 7. 17. Per Vavisor,

127. And

127. And in *cui in vita* against the alienage of the baron, the parol shall not demur by nonage of the heir of the baron, but expecter emptor, &c. yet if the action be brought against the alienage of the baron, there the parol shall demur by the age of the heir of the baron. Br. Parliament, pl. 21. cites 14 H. 7. 17.

The same seems to be where it is brought against the alienage of the alienage.

Br. Parliament, pl. 21. cites 14 H. 7. 17.

128. Acts which give new remedies, shall not have liberal construction. 2 Sid. 63. Hill. 1657. B. R. in case of Pool v. Neel.

129. Statutes that give costs are to be taken strictly, as being a kind of penalty. 1 Salk. 205. Mich. 2 W. & M. B. R. Cone v. Bowles.

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Carth. 179.
S. C.

130. It was doubted whether a gaoler could detain a prisoner discharged by the late statute for relief of poor prisoners for his fees; and it was said, that Treby Ch. J. of C. B. held he might; for the act being for giving away the right of the subject, it ought to be construed strictly; and per Holt Ch. J. let an act of parliament be ever so charitable, yet if it gives away the property of the subject, it ought not to be countenanced. 12 Mod. 513. Pasch. 13 W. 3. B. R. Callady v. Pilkington.

131. Where the statute is, that a man shall import bullion of 2 marks for every sack of wool imported, and another statute is made that a merchant shall not be charged but of ancient custom only, this does not repeal the first statute. Br. Parliament, pl. 52. cites 4 E. 4. 12.

Subsequent statutes, where they toll, &c. precedent.

132. It is a rule that *leges posteriores abrogant priores*; but though this holds in thesis, yet it does not hold in hypothesis, if the last act be not contradictory or contrary to the former; but if it be only so far differing or disagreeing that by any other construction they may both stand together, it is otherwise, and so is Dyer 343. 18 Eliz. & 11 Rep. [63. b.] Trudgin's case 21 Eliz. cited there in Foster's case, that where tenant in tail by the statute of W. 2. shall not forfeit the lands, and afterwards 6 R. 2. enacts, that a man attainted of præmunire shall forfeit lands, this shall not be extended but only to lands in fee, and for life, and not to lands in tail, and yet all are within the words; and there in Foster's case the statute of 23 Eliz. gave 20l. a month to be divided between the king, the poor, and the informer: and afterwards the statute of 28 Eliz. gives seisure to the king, and 35 Eliz. gives liberty to the king to pursue by bill, plaint, or information, yet this does not take away the third part from the informer; per Jones J. Jo. 22. Hill. 18 Jac. C. B. in the case of Standen v. the University of Oxford and Whitten.

11 Rep. 64. b. in Dr. Foster's case, the same rule cited Arg. and cites 43 Aff. pl. 9. That the statute 13 E. 3. cap. [1] de mercatoribus, which gives assise to the tenant by statute merchant, shall not take away the assise which the tenant of the franktenement had

before, but both may well stand together. And so D. 50. pl. 3. 33 H. 8. where it was enacted, that the younger son should have appeal of the death of his father, this does not exclude the eldest son of his suit, because there are no words of restraint.——And see Roll's Rep. 90, 91. &c. in the case of the King v. Dr. Foster.——See Litt. Rep. 212. Mich. 4 Car. in C. B. the case of the College of Physicians.

See 2 Roll's Rep. 410. Mich. 21 Jac. B. R. in the case of Ascue v. Butts.

A later statute in the affirmative shall not toll a former act, especially if the former be particular, and the last general. 6 Rep. 19. b. Gregory's case.

But if the former be general, and the later particular, the later would control it. See Arg. 8 Show. 421. Trin. 6 W. & M. in the case of the King v. the Bishop of London and Dr. Birch. Where

Where two statutes are *consistent*, and may stand together, the later is no repeal of the former. Arg. 2 Show. 439. cites 11 Rep. 5, 6. Dr. Foster's case.

* This is a true rule, but repeals *by implication* are things *disfavoured by law*, never allowed of but where the inconsistency and repugnancy are plain and unavoidable; for these repeals carry along with them a tacit reflection upon the legislators, that they should ignorantly, and without knowing it, make one act repugnant to and inconsistent with another, and such repeals have been ever interpreted so as to repeal as little of the precedent law as is possible. 10 Mod. 118. Arg. cites 11 Rep. 56. 1 Roll. Rep. 88. Foster's case.

But if the prior statutes were contrary it is otherwise. See 1 Rep. 25. b. in Porter's case.—— 2 Brownl. 324. in the case of Chalke v. Peter, S. C.——Cro. J. 121. pl. 4. Dr. Laughton v. Gardiner, cites S. C.

133. *Subsequent* statutes that give a *greater punishment* do not take away the power given by a precedent statute; per Curiam. See 6 Mod. 141. Pasch. 3 Annæ B. R. The Queen v. Pugh & al.'

Words.

4 Le. 172.
Arg. cites
Ld. Norris's
case.——

134. *Right, interest, hereditament, and in as ample manner* in an act of parliament do not extend to a writ of error or right of action; per Croke J. cites 3 Rep. 2. a. The Marquis of Winchester's case.

But the word *actions* was not there. Ibid. 173.

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1 Roll. Rep.
404. S. C. ac-
cordingly.

So the sta-
tute of 21
H. 8. 13. of
Pluralities,
is, that
chaplains
may pur-
chase li-
cence, &c.
this does not
give liberty
to do it or
not to do it;
but if they
do not do

135. 28 Eliz. 4. is, that the sheriff *shall not take more than* so much in the pound for an execution; per tot. Cur. this *im-plies* that *they shall take so much* as is not prohibited. Mo. 853. pl. 1166. Pasch. 14 Jac. B. R. Proby v. Lumley and Mitchell.

136. Indictment on 14 Car. 2. cap. 12. against churchwardens and overseers, for not making a rate to reimburse the constables; exception was taken, that the statute only puts it in their power to do so by the word (may, &c.), but does not require the doing of it as a duty, for the omission of which they are punishable; sed non allocatur; for where a statute directs the doing of a thing for the sake of justice, or the publick good, the word *may* is the same as the word *shall*; thus 23 H. 6. says, the sheriff may take bail; this is construed he shall; for he is compellable so to do. 2 Salk. 609. pl. 1. 5 W. & M. B. R. The King and Queen v. Barlow.

it, they cannot hold two livings of 8l. value. Arg. Mod. 440. Hill. 38 Eliz. in the case of Robins v. Gerrard.——So where the statute directs that the Ld. Chancellor may grant a statute of bankruptcy. Vern. 154. Pasch. 38 Car. 2. Blackwell's case.

In general.

* All things
which may
be taken
within the
mischief of
the statute
shall be
taken with-
in the equi-
ty of it,
Arg. Godb.
808. cites
4 H. 6. 26.

137. The sure and *true way to interpret* all statute in general, whether penal, or beneficial, restrictive, or enlarging of the common law, is to consider these 4 things, 1st, What the *common law was before* the making the act. 2dly, What the mischief and defect for which the common law did not provide. 3dly, What remedy the parliament has resolved, and appointed, to cure the disease of the commonwealth. 4thly, The true reason of the remedy, and then the office of the judges is always to make such construction as redresses the * mischief and advances the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the remedy, according to the true *intent* of the makers of the act,

act, *pro bono publico*. 3 Rep. 7. b. Pasch. 26 Eliz. in Scac. Per Martin, & 14 H. 7. Heydon's case. 13.

The true understanding of the common law, and of former statutes, is the sure master-expositor of the later. 2 Inst. 518.

Where a mischief is to be remedied by a statute, the remedy in the exposition of the statute is to be applied according as the mischief does require. Arg. 2 Lc. 90. pl. 114. in Folke's case.

138. It was agreed, that where the statute of *Westm. 2. cap. 35.* is, that where the plaintiff in writ of ward *ratione proprii feodi* dies, the heir shall have resummons, yet if the principal writ was discontinued in the life of the father, the heir shall not have resummons; for the statute is intended where the writ is gone by the act of God, viz. Death, but discontinuance is the folly of the party. Br. Parliament, pl. 23. cites 24 E. 3. 48.

139. Where acts of parliament make a thing void, it shall be void to all intents, and shall have a very violent relation. Arg. See Lat. 143. in Sir Geo. Reynell's case. 2 Jo. 19. cites 3 H. 7. 15. 4 H. 4. 10. 10 H. 7. 22. b. D. 227. 377. Fitzh. Partition 2.

140. Acts of parliament are so to be construed, as that no man, that is innocent or free from injury or wrong, be by a natural construction punished or endamaged. Co. Litt. 360. a.

141. It is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresses the meaning of the makers; as where the question upon the general words of the statute of Gloucester was, whether a fine levied only by a husband seised in the right of his wife with warranty, should bar the heir without assents: and it is well expounded by the former part of the act, whereby it is enacted, that alienation made by tenant by the courtesy with warranty shall not bar the heir, unless assents descend; and therefore it should be inconvenient to intend the statute in such manner as that he that has nothing but in the right of his wife should by his fine levied with warranty bar the heir without assents. And this exposition is *ex visceribus actus*. Co. Litt. 381. a. b. [527]

142. And the words of the act of parliament must be taken in a lawful and rightful sense, as where the words were (where no fine is levied in the King's Court), they are to be understood (whereof no fine is rightfully and lawfully levied in the King's Court), and therefore a fine levied by the husband alone is not within the meaning of the statute, for that fine would work a wrong to the wife; but a fine levied by the husband and wife is intended by the statute, for that fine is lawful, and works no wrong: so the statute of *W. 2. cap. 5.* says (*ita quod episcopus ecclesiam conferat*), is construed, *ita quod episcopus ecclesiam legitime conferat*, and the like in a number of other cases in our books; and generally the rule is, *quod non præstat impedimentum quod de jure non sortitur effectum*. Co. Litt. 381. b.

143. And further construction must be made of a statute in suppression of the mischief, and in advancement of the remedy, as by this case it appears; for a fine levied by the husband only is within the letter of the law; but the mischief was, the heir was barred

barred of the inheritance of his mother by the warranty of his father without assents; and this act intended to apply a remedy, viz. That it should not bar unless there were assents; and therefore the mischief is to be suppressed, and the remedy advanced, et qui hæret in litera, hæret in cortice. Co. Litt. 381. b.

144. The *best expositors* of all statutes are our books, and use or experience. 2 Inst. 25.

145. Statutes must be so construed, as that no collateral prejudice grow thereby. 2 Inst. 112.

146. In statutes incidents are always supplied by intendment. 2 Inst. 222.

147. When laws or statutes are made, yet there are *some things* which are exempted and foreprized out of the provision thereof by the law of reason, though not expressly mentioned. See Pl. C. 13. b. in the case of Reniger v. Fogossa.

6 Rep. 6.—

They shall

be construed according to the exposition made of them by such sages of the law as lived near the time when they were made. D. 131. pl. 70. Pasch. 2 & 3 Ph. & M. in the case of Hill v. Grange.

148. *Optimus legum interpret est consuetudo.* 2 Rep. 81.

149. One part of an act of parliament may expound another. See 5 Rep. 99. Mich. 40 & 41 Eliz. in Flower's case.— 10 Rep. 138. b. in the case of Chester Mills.

150. An act of parliament binds all but such as are specially saved by it. As if one be tenant in tail, and it is enacted, that he shall have the land to him and his heirs, he has fee, and the tail is determined. 2 And. 118. pl. 82. Hill. 41 Eliz. in the case of Rowland v. Arture.—cites Broke 28 H. 8.

151. No statute, where the letter is ambiguous, shall be taken by equity contrary to the letter to maintain a thing or mischief contrary to the letter or intent of the statute, which meant to toll mischiefs and inconveniencies; but it shall be taken in the better intent and largely to toll and destroy the mischiefs and inconveniencies: and therefore the statute of 1 Ph. & M. which provides, that all trials for treason shall be made according to the due order and course of the common law of the land, and not otherwise, yet *DRORKE, who committed treason in Ireland, was tried here according to the statutes before made 35 H. 8. & 5 E. 6. notwithstanding the stat. of 1 & 2 Ph. & M. and so it appears, that notwithstanding the general words of the statute of 1 & 2 Ph. & M. the trial was otherwise; and the reason of this was, that treason beyond the sea is as mischievous as that which is done within the land; and therefore it was not the intent of the said statute, that such treasons should pass unpunished, but intended of those treasons only which might be tried within the land; and those are such as are done within the realm. See 2 And. 149. pl. 82. Hill. 41 Eliz. in the case of Rowland v. Arture.

* And. 262.

pl. 269.

5111. 33

Eliz. S. C.

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152. Where an act of parliament speaks of an assignee, &c. it is to be intended of a complete assignee, &c. that has all ceremonies and incidents requisite by the law to such assignee, &c. or not to take

take away any ceremony or circumstance which the law requires, nor to do any thing contrary to the common law. See 5 Rep. 112. b. Pasch. 43 Eliz. B. R. Mallory's case.

153. Judges are to make such exposition of laws and statutes as suffer them not to be *eluded*. Hob. 97. Trin. 7 Jac. Moor v. Hussey. 3 Rep. 7. b. — 11 Rep. Magdalen College's

case. — See Arg. 10 Mod. 344.

154. Judges have power over statute laws to mould them to the truest and best use according to *reason* and best *convenience*. Hob. 346. 13 Jac. in the case of Sheffield v. Ratcliffe.

155. A *branch* of a statute shall not be taken larger than the body. Hob. 310. Hill. 15 Jac. in the case of Wright v. Gerard.

156. Words of a statute ought not to be interpreted to *destroy natural justice*. Arg. Sti. 81. Hill. 23 Car. B. R. in the case of Rawson v. Bague.

157. When the *words* of a law extend not to an inconvenience rarely happening, and do to those which often happen, it is good reason not to strain the words farther than they reach, by saying it is casus omissus, and that the law intended quæ frequentius accidunt. But it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom. Vaugh. 373. Mich. 25 Car. 2. C. B. in the case of Bole & al' v. Horton.

158. No statute shall be interpreted so as to be *inconvenient* and *against reason*. Cart. 136. cites Litt. S. 138. 5 Rep. Cawdrie's case.

159. The act of 12 Car. 2. 17. for confirming parsons presented in the late times (who conform as the statute directs) in their churches, notwithstanding any act or thing whatsoever, yet those words do not extend to one promoted by *simony*, as is apparent upon reading the said statute; per Cur. Sid. 222. Mich. 16 Car. 2. B. R. Snow v. Philips.

160. It is a known rule in interpretation of statutes, that such a sense is to be made upon the whole, as that *no clause, sentence, or word shall prove superfluous, void, or insignificant*, if by any other construction they may all be made useful and pertinent. Arg. Show. 108. Mich. 1 W. & M. in case of the King v. Berchett.

161. Where an act of parliament creates a new interest, it shall be governed by the like law such interests were governed by before; per Holt J. 12 Mod. 486. Pasch. 7 W. 3. B. R. in the case of Lane v. Sir Robert Cotton.

162. Whenever an act of parliament makes an offence, and is *silent in the manner of trying it*, it shall be intended to be a trial *per pais* according to Magna Charta. Farr. 99. Mich. 1 Anne B. R. The Queen v. Sturney.

163. Where an act gives justices power generally to determine a matter at the sessions, it must be according to law, and as a Court; Per

Per Holt Ch. J. 6 Mod. 17. Mich. 2 Ann. B. R. The Queen v. Bothell.

164. A statute was made in Ireland, that every *heir of a papist shall file the bishop's certificate of his conformation within a year after his age of 21, yet may file it before his age of 21*; for the act is only meant as an encouragement for persons to renounce popery. MS. Tab. Tit. Statutes, pl. 1. June 22, 1717. Burk v. Morgan.

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(E. 7) Words of Forfeiture.

Br. Scire Facias, pl. 58. cites S. C.

1. **I**T seems by the case of the scire facias brought by the heir of the Lord S. B. upon his restitution, that where it is enacted by parliament, *that the Lord S. B. shall forfeit his land in use, and in possession, and certain feoffees were seised of a certain manor in fee at the time, &c. to the use of the Lord S. and the heirs males of his body, the remainder to the use of J. K. in fee, that nothing shall be forfeited but the estate tail to the Lord S. B. only, and not the remainder in use.* Br. Parliament, pl. 10. cites 7 H. 4. 20.

2. It was enacted by parliament, *that whereas J. S. had beat R. C. servant to C. B. coming with his master to parliament, anno 5 H. 4. that proclamation shall be made where the affray was, and that if the said J. S. does not render himself before the justices of our lord the king ad placita, &c. within one quarter of a year next, &c. That the said J. S. shall be convicted, and render double damages by discretion of the justices aforesaid, or by inquisition; and he rendered himself after proclamation before the Chancellor, and before the king, and not before the justices, by which capias was awarded, and he did not come, but came after, and would have pleaded, and was not permitted, but judgment given, that the plaintiff should have writ of inquiry of the damages to the sheriff of L. For the ordinance in parliament was a judgment in itself, which, because he has not pursued, the act is sufficient to award writ of inquiry of damages; quod nota. And after anno 9 H. 4. fol. 1. the plaintiff was viewed, and upon the view of his wounds, the Court awarded double damages, scil. 200 marks, notwithstanding it was alleged, that J. S. was dead; for he was out of Court before, and cannot be warned to appear again, and this seems to be by the awarding of the writ of inquiry of damages. Br. Parliament, pl. 11. cites 8 H. 4. 13. & 20. and 9 H. 4. 1.*

But where an arch-deacon for money granted the office of register, this is forfeited to the King, and not to

3. Whensoever a statute gives a forfeiture or penalty against him which wrongfully detains or dispossesses another of his duty or interest, in that case *he that has the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at the common law, and the king shall not have the forfeiture in that case.* And so it was adjudged in the Exchequer upon conference with other judges in an information for the treble value for

for not setting out of tithes in Iclington in the county of Cambridge. Co. Litt. 259. a. the bishop. 3 Lev. 289. Hill: 2 W.

& M. C. B. Woodward v. Fox.

4. The words (*shall forfeit*) vests only a right or title, and not the freehold in deed, or in law, without an office to find the certainty of the land. Pl. C. 486. Nichols v. Nichols. 1 Rep. 42. in Altonwood's case.

5. If an act of parliament gives a forfeiture for a *collateral thing*, the king *shall have it*, but where it is given in lieu of property and interest, it shall go to the person injured. But where it is given for a *crime*, the king shall have the forfeiture, though he be not named. Roll: R. 90. Mich. 12 Jac. B. R. in case of the King v. Dr. Foster.—Per Manwood Ch. B. Mo. 238. pl. 373. S. P.

6. Where a statute gives a forfeiture of *all inheritances*, it does not extend to an estate tail, but where it is of *all manner of inheritances*, estates tail are comprehended. Jenk. 287. pl. 21. Hob. 334. S. C. Sheffield v. Ratcliff.

7. Statutes in point of forfeiture *forfeit no more than a man hath*. But yet a statute may give to the king that which a man has not. Arg. Godb. 315. pl. 417. Pasch. 21 Jac. in the Exchequer Chamber, in case of SHEFFIELD v. RATCLIFF, cites 11 Rep. 13. where the saving was only to strangers, not to donors or their issue, and HUSSEY'S CASE, and old Entries 423. b. c. d. [530] As if tenant in tail, remainder over forfeits, &c. the remainder is saved without words of saving. But if the statutes gives the land by name unto the king, then the remainder is not saved, but is destroyed. Godb. Arg. 315. in case of Sheffield v. Ratcliff.

8. If a *right of action* be given to the king, the statute of limitations and fines is destroyed; for he is not bound by them in point of forfeiture. Arg. Godb. 315. cites Pl. C. 485, 486. and Stamf. 187, 188. But a right of action is not given to him by general words

of an act, because it lies in privity. Arg. Godb. 315. cites 4 Rep 154. And Arg. Godb. 316. cites 3 Rep. 3.

* Resolved 3 Rep. 2. The Marquis of Winchester's case.

9. If a man has a rent out of land, and an act of parliament gives the land in particular to the king, or to a common person, without saving the rent; the rent shall be extinguished; but this is where the grant is general without any limitation or qualification; but when the act of parliament is limited, and *sub modo* the rent continues; per Jones J. Jo. 235. Pasch. 7 Car. B. R. in case of Falkner v. Bellingham.

10. Where a statute makes a forfeiture, and gives power to seise generally, without naming any persons that shall seise, in such case any person, though he is no officer, may seise for the king. Carth. 327. Trin. 6 W. & M. in Scacc. in case of Martin v. Wilsford.

11. Penalty given by a statute to be recovered in any court of record must be taken strictly for those at Westminster, because of its being a penal law; and the Courts at Westminster are those which the king's attorney general attends. 1 Salk. 178. in the case of Walwyn v. Smith, cites Gregorie's case.

12. These

Adjudged
2 Jo. 26.
Anon.

12. These words in an act of parliament (*to be levied by distress*) must be understood of distress and sale. Said per Cur. Mich. 2 Ann. B. R. in the case of Morley v. Staker, 6 Mod. 83. to have been solemnly resolved in the case of Davis v. Speed.

13. If a statute gives a penalty to be recovered before a justice of peace, and prescribes *no method*, it must be by bill; per Holt Ch. J. 2 Salk. 606. Mich. 2 Ann. B. R. Anon.

14. A conviction for deer-stealing was removed against A. & B. wherein judgment was given, that each should forfeit 30l. It was objected, that there ought to be but one 30l. forfeited; sed non allocatur: for the words of the act are, that they shall *respectively forfeit* 30l. and cited Cro. Eliz. 480. Mo. 453. Noy. 60. And this penalty is not in nature of a satisfaction to the party grieved, but a punishment on the offender, and crimes are several, though debts be joint; which per Powell distinguishes this from the case of Partridge and Naylor in Cro. El. 480. and Noy. 62. 1 Salk. 182. pl. 3. Hill. 10 Ann. B. R. *The Queen v. King & al.*

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(E. 3) Of Saving.

So where a
man has an
annuity out
of a par-
sonage

1. **W**HERE land, &c. is charged with a rent-charge, if this land be given by an act of parliament, the rent is by this discharged; per Vavisor. Br. Parliament, pl. 28. cites 21 H. 7. 3.

which is given to another by act of parliament, the annuity is extinct by gift of the land by parliament; per Vavisor. But Frowick Ch. J. held, that the annuity remained; for the parson is charged, and not the parsonage. But he said nothing to the case of the land charged given by parliament. It seems, that it is not determined; for they give the land as the land is, and it is not like where the charge enters and makes scotment of the land out of which, &c. discharged, &c. But Brooke says, quære; for it is used in acts to have a proviso or saving for such rents, commons, annuities, &c. to strangers. Br. Parliament, pl. 28. cites 21 H. 7. 3.

But see in the case of the assurance by act of parliament of land charged, it seems, that it is not a gift by parliament, but is a judgment of the parliament; and judgment of land charged shall not discharge the charge, unless the title of the judgment be before the charge. Br. Parliament, pl. 28.

And where
the king is
intitled to
the land by
office for
escheat, and
after it is
enacted by
parliament,
that the
king shall
enjoy it,
saving to all
others their
seigniories,
&c. there

2. If the king be intitled to the land of J. S. by forfeiture of treason, or felony, by act of parliament or office, by this all tenures are determined, as well of the king as of all others; there if this land after be given to another by another act of parliament, saving to all others all their rights, interests, titles, rent, service, &c. as if no such act had been, there the seigniories, &c. shall not be revived; for no seigniority was in esse at the time of the second act made; and here are no words to give any reviving, but words of saving, which do not serve but to save that which is in esse at the time of the saving, &c. but such proviso in the first act will serve; for it came with the act which intitled the king. Br. Parliament, pl. 77. cites 27 H. 8.

such a saving will not serve for the reason aforesaid; for all was extinct before by the office, and nothing was in esse at the time of the saving, which was in ure between the KING and KEEWICHE in the county of Essex, where KEEWICHE lost his seigniority; quod nota. But there ought to be words affirmative, that the lords ought to have their seigniories. Ibid.

3. If act of parliament gives the manor of D. signanter, and by this name, to the king, saving rights of such as have right, or saving the right of strangers, the saving is void, because it is repugnant; and the certainty of it, and the special name takes away the right of the owner; and also the owner is party to the act. Jenk. 196 pl. 4. (bis).

But if an act gives all manors which A. has, saving the right of strangers, it is good. Jenk. 213, pl. 50.

4. A saving cannot save or revive that which is not in esse without express words of grant or restitution. Dav. 3. b. 4. in case of proxies.

5. A saving in an act of parliament which is repugnant to the body of the act is void. Pl. C. 565. a. in Walsingham's case. — 1 Rep. 47. in Altonwood's case.

6. The saving in a statute is only an exception of a special thing out of the general things mentioned in the statute. 2 And. 192. pl. 8. in the case of Halliswell v. the Corporation of Bridgwater.

7. Savings in acts of parliament were but of late days. Arg. Godb. 304. pl. 417. Pasch. 21 Jac. in the Exchequer Chamber, in the case of Sheffield v. Ratcliff.

8. A saving of the rights of all others except the heirs, &c. of the offender, &c. is an exclusion of the heirs, &c. Arg. Godb. 309. in the case of Sheffield v. Ratcliff.

9. Where a saving is in destruction of all the purview, it shall be void. Jo. 339. Hill. 9 Car. B. R. in the case of the King v. Priest. [532]

purview, but was never allowed to overthrow it quite. Admitted. Arg. 10 Mod. 215. Mich. 31 Ann. C. B. in the case of Thornby v. Fleetwood. It may qualify and restrain the

10. A saving never will make a thing within a statute, which was not contained within the generality of the premises. Per Jones.

(E. 9) Repealing.

1. **W**HEN an act of repeal is repealed, the first act repealed is revived. 12 Rep. 7. cites Spencer's case. 15 E. 3. S.P. Raym. 397. Trin. 32 Car. 2. Tit. Petition 2. B.R. Adon. — As by

the repealing an act which repealed a former act, the first act is revived; so by the reviving of an act repealed, the repealing act is made of no force, as where the act of 1 Eliz. cap. 1. revived the act of 25 H. 8. cap. 20. this does impliedly repeal the 1st of E. 6. which had repealed the 25th of H. 8. 2 Inst. 686.

2. But if 3 several acts repeal or annul an act, though 1 or 2 of the acts of repeal or annulment are repealed, yet the other which remains in force annuls the first act. See 12 Rep. 7. Pasch. 4 Jac. The Bishop's case, upon the statutes of 1 E. 6. cap. 2. 1 M. Parl. 1. cap. 2. Sess. 2. and 1 Jac. cap. 25.

3. Where one statute is repealed by another, acts done in the
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mesur time shall stand, but not if a statute be declared null. Jenk. 233. pl. 6. cites 4 H. 7. 10 H. 7. 22.

(E. 10) To bind the King.

1. **I**N quare impedit an *act* of parliament was pleaded that the king shall not present in auter droit, unless of voidance in his own time, which was not in ure before, and yet the Court was against the king, that it should be put in ure now. Br. Parliament, pl. 12, cites 11 H. 4. 7. & 38.

S. P. Cro.
C. 526.
Although's
case.—

2. In quare impedit it was agreed by Prisot and Ashton, that a statute shall not bind the king, if it be not by *express words*. Br. Parliament, pl. 6, cites 35 H. 6. 62, 63.

It is a ge-

neral rule, that the king shall not be bound by a statute, which does not expressly name him. 2 Hawk. Pl. C. 411. cap. 42. S. 3.

Therefore if the king usurps upon an infant to a benefice, this shall put the infant out of possession, notwithstanding the statute of Westminster 2. cap. 5. which aids usurpation upon an infant, some covert, and those in reversion; for the king is not bound by it; for where a man presents to the benefice of the king, and his clerk in by 6 months, yet the king shall have quare impedit after the 6 months, for *nullum tempus occurrit regi*; for the statute shall not bind him. Contra in case of a common person after the 6 months. Br. Parliament, pl. 6, cites 35 H. 6. 62, 63.

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3. Per Prisot, there is a statute, anno 7 H. 4. cap. 4. that protection does not lie for warden of a prison in debt brought against him upon escape of a prisoner condemned and committed to his ward; and therefore by him the king shall not grant protection there. And therefore see that this is a statute which shall bind the king; for none can grant protection but the king only, and therefore that the statute says that the protection shall not lie, is as much as to say that the king shall not dispense with the statute; *quod nota*. Br. Parliament, pl. 30, cites 39 H. 6. 39.

Br. Parli-
ment, pl. 6.
cites S. C.

4. It was enacted by parliament, that the Lord Hungerford should be attainted of treason, and forfeit his lands, with a proviso that of such lands as he was seised to the use of others, that *cestuy que use may enter*; and yet where the king is seised he cannot enter upon him, but shall *sue ouster le main*. And so it seems that the king is not bound by any statute, unless by express words of the king, as if it had been that he may enter as well upon the possession of the king as upon others. Br. Entre Cong. pl. 134. cites 4 E. 4. 21.

5. It was agreed by the justices, that the statute of additions made anno 1 H. 5. cap. 5. shall bind the king as to indictments, &c. and otherwise, as well as common persons. Br. Parliament, pl. 47, cites 5 E. 4. 32.

6. Upon the construction of any statute, nothing shall be taken by equity against the king. Arg. Godb. 308. in case of *Ld. Sheffield v. Ratcliff*, cites Pl. C. 233, 234.

7. Where the subject has authority to do a thing by the express letter of a statute, this shall not be taken away by any strained construction, though it be for the benefit of the king; per **Doderidge**

Doderidge J. Roll. R. 67. in case of Worral v. Harper, cites 10 Rep. 84. Love's case.

8. Neither ** affirmative statutes, nor negative*, which are more strong, shall bind the king, unless he be specially named. As the *statutes of limitations*, viz. of Merton, cap. 8. W. 1. cap. 3. and 32 H. 8. cap. 2. do not bind the king. So the statute of W. 2. cap. 5. which gives the plea of plenarty by 6 months, does not bind the king, cites F. N. B. 241. (B) 24 E. 3. 23. &c. So by the statute of 18 E. 1. of *+ quia emptores terrarum* the king is not bound as is held in 10 H. 7. 23. a. &c. The statute of Magna Charta, cap. 11. provides in the negative, *quod communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo*; but this does not bind the king, as is adjudged in 23 H. 3. Tit. Brief, and 31 E. 1. Tit. Prærogative 28. For he may have *quare impedit* in B. R. Arg. 11 Rep. 68. a. b. Pasch. 13 Jac. in Magdalen College's case.

* An affirmative law does not take away the prerogative at common law. Arg. Hard. 25. Mich. 1655. in Scacc. in case of the Attorney General v. Andrew. + S. P. Br. Apportionment, pl. 21. cites F. N. B. 234, 235.

9. General statutes, which provide necessary and profitable remedy for *maintenance of religion, advancement of learning, and for relief of the poor*, shall be extended generally according to the words of them, and the king not exempted. Resolved unanimously. 11 Rep. 70. a. b. Magdalen College's case.

Arg. Show. 208. S. C. cited.

10. The king shall not be exempted out of the general words of acts made *to suppress wrong*, because he is the fountain of justice and common right, cites 13 E. 4. 8. a. and 1 Rep. 44. b. 48. a. &c. ALTONWOOD's case. And though right was remediless, yet the act which provides necessary and profitable remedy for the preservation thereof, and to suppress wrong, shall bind the king, cites Pl. C. 246. LORD BARKELEY's case, where it was adjudged that the king tenant in tail was restrained from alienation by the statute de Donis. See 11 Rep. 72. a. Magdalen College's case.

All statutes made in suppression of wrong, taking away fraud, or to prevent the decay of religion, shall bind the king, though not named in it, nor bound

by express words. See 5 Rep. 14. b. Mich. 43 & 44 Eliz. in parliament in the case of ecclesiastical person. Arg. Show. 209. S. C. cited. Ibid. 419. Arg. Ibid. Per Eyre J. 497.

* When any statute is made to prevent or suppress any *+ wrong*, the king (though not named) is bound by it, because he can do no wrong. 4 Mod. 207. Pasch. 5 W. & M. B. R. Attorney General v. Dr. Lancaster.

+ The king is bound by laws of *publick use and benefit*, and where the contrary will be any wrong to the subject. Arg. Show. 209. cites 5 Rep. 14. He is bound by the *statute of Marlbridge* 22. against *disfranchising tenants to answer without writ*, as 2 Inst. 124. & 169. And by the *statute* 32 H. 8. 28. of *discontinuances*. 2 Inst. 681, 682. because they are made to give her who had a right a *more speedy remedy*, viz. by entry, where at common law she was forced to a real action. So is BARKELEY's case, Pl. C. 233. 1 Rep. 44. 1 Inst. 116. The king is bound by the *statute de Donis*, because an alienation would be a wrong to the subject. Arg. Show, 419, 420.

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11. The general words of statutes, which tend to *perform the will of the founder or donor*, shall bind the king, though he be not named. See 11 Rep. 72. b. 73. a. where it is unanimously resolved in Magdalen College's case.

12. Where the king has any prerogative, estate, right, title, or interest, *As if an act be that all*

hiddes shall interest, he shall not be barred of them by general words of an act. *be abated,* Resolved. 11 Rep. 74. b. in Magdalen College's case!

yet the kld. *cles of the king shall not* be abated. See Keilw. 95. pl. 3. — In the most minute cases of the king's prerogative, it cannot be taken away by general words in an act of parliament. Arg. 8 Mod. 14. in the College of Physician's case.

It is clear that the king cannot be divested of any of his prerogatives by general words in an act of parliament, but that there must be plain and express words for that purpose, though all his other rights are no more favoured in law than the rights of his subjects. 8 Mod. 8. Mich. 7 Geo. The King v. the Archbishop of Armagh. — S. P. 8 Mod. 14. in the College of Physician's case.

13. The general statute of 32 H. 8. cap. 36. of fines for avoiding controversies, shall bind the king. 11 Rep. 75. a. in a note of the Reporter, in Magdalen College's case, cites 7 Rep. 22.

14. Where the king is barred by a statute to do wrong he is bound, but where the king is intitled to any interest in property, this cannot be taken from him without special mention in the statute. Jo. 21. Arg. And says, this distinction is allowed in Magdalen College's case.

15. An act of parliament, which gives a right to the king, shall bind him as to the manner of enjoying, and using that right as well as a subject. Arg. Show. 211. Pasch. 3 W. & M. Mr. Crooke's case.

16. 29 Car. 2. cap. 3. of frauds and perjuries binds not the king, but takes place only between party and party. 1 Salk. 162. 4 W. & M. in case of the King v. Lady Portington.

17. The queen is never named in an act of parliament by the name of party; per Powell J. 2 Ld. Raym. Rep. 166. Mich. 3 Ann. in case of the Queen v. Tutchin.

(E. 11) Statute Merchant, Staple and Recognizance. Statutes, relating thereto.

* This statute is mentioned to be 11 or 13 E. 1. But the better to distinguish
1. * Stat. 11 E. 1. of ENACTS, that a merchant which will be sure of his debt, shall cause his debtor to come before the mayor of London, or of York, or Bristol, or before the mayor and a clerk (which the king shall appoint for the same), for to acknowledge the deb., and the day of payment.

the one from the other, I have marked this as only 11 E. 1. — Though the word mayor is expressed in this statute, and no other principal officer is mentioned, yet there is no doubt but it may be taken before another, who is a principal officer of a corporation, though he be not a mayor; per Hobart Ch. J. Win. 86. Trin. 22 Jac. C. B. in the case of Hickford v. Machin.

† † See (F) pl. 1. — If the statute be to pay at several days, it is a quære in law, whether it be payable till all the days of payment are past, as of a bond: per Hobart Ch. J. Win. 86. in case of Hickford v. Machin.

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But though the statute be not enrolled in two places, nor writ with the hand of the clerk, yet the omitting of them is not a circumstance to avoid the statute. Cro. E. 810. pl. 14. Hill. 43 Eliz. C. B. in case of Forest v. Ballard.

See (F) Moreover, the said clerk shall make with his own hand a bill obligatory, whereunto the seal of the debtor shall be put with the king's

king's seal, to be provided, which shall remain in the keeping of the mayor and clerk aforesaid.

And if the debtor does not pay at the day, the creditor may come See (K) before the mayor and clerk with his bill. And if it be found by the roll, and by the bill, that the debt was acknowledged, and that the day of payment is expired, the mayor shall incontinent cause the moveables of the debtor to be sold, as far as the debt does amount, by the praising of honest men, as chattels burgages devisable, until the whole sum of the debt, and the money without delay shall be paid to the creditor. And if the mayor can find no buyer, he shall cause the moveables to be delivered to the creditor at a reasonable price, as much as doth amount to the debt. And the king's seal shall be put unto the sale and deliverance of the burgages devisable.

And if the debtor have no moveables within the jurisdiction of See (R) the mayor, whereupon the debt may be levied, but has some elsewhere, then shall the mayor send the recognizance unto the chancellor under the king's seal. And the chancellor shall direct the writ unto the sheriff, in whose bailiwick the moveables be, that the sheriff cause him to agree with the creditor, as the mayor should have done, in case the moveables had been within his power.

And let them that shall praise the moveable goods, take heed, that Upon a statute merchant, the debtor, after certificate certified, and they set a reasonable price upon them; for if they set an over high price for favour born to the debtor, and to the damage of the creditor, then shall the thing so praised be delivered unto themselves at such price.

copies to take the body, returned non est inventus, the creditor prayed livery of the land, and had it, and the sheriff extended the land by two extenders, and delivered it to the counslee, and returned the writ accordingly, and came the counslee, and said, that the sheriff had extended the land too high, scil. every acre which is worth no more than 12d. at 3s. and prayed that the land might be delivered to the extenders to hold according to the extent, and to answer to him of the money. Thorp said, the statute speaks only of burgages, and not of lands; and yet it was delivered to the extenders, and this by the equity as it seems. Br. Statute Merchant, pl. 14. cites 31 E. 3. 31.

But where the counslee took the lands extended, and afterwards came, in a subsequent term to that in which the extent was returned, and prayed that it be delivered to the extenders at the value, it was denied. Br. Extent, pl. 2. cites 44 E. 3. 2. — Br. Statute Merchant, pl. 2. cites S. C.

If upon a writ of elegit, or other writ of execution sued upon a judgment, the extenders extend the lands or goods too high; in this case, the plaintiff has no remedy by this statute, or by the statute de Mercatoribus, or otherwise, to pray that the extenders may take the goods, and pay the money which they have appraised them at; for those being penal statutes, do not extend to any other writs of execution, but only the statute merchant, and staple or recognizance. By all the justices of C. B. Bendl. 39. pl. 100. Mich. 4 & 5 P. & M. Anon.

Cro. J. 12. pl. 16. Pakh. 1 Jac. B. R. MOLMEUX v. LACON. Upon a recognizance in Chancery, the plaintiff refused before the sheriff, to accept the lands, because they were extended too high, and prayed that the extenders might retain them, and a case was shewn out of Bendl. 4 & 5 P. & M. [which seems to be the case above], and of that opinion were all the Court in this case; and that the plaintiff had time enough to pray it upon the return of the writ; wherefore it was awarded that the extenders should have the land at that rate, and that they should pay the debt.

Counslee extended a statute, and before his acceptance prayed, that the land be delivered to the extenders. Process issued accordingly, but before the return of the writ it was moved, that the extenders cannot have the land; because since the extent, the counslee is dead, his heir within age, and in ward of the king; so that the king is now in possession and the land in other plight than it was at the time of the extent. Sed non allocatur per Curiam. Yelv. 55. Mich. 2 Jac. B. R. Molmeux v. Rigges.

And they shall be forthwith + answerable unto the creditor for [536] his debt.

mean that they shall pay all the money presently without delay, but they may answer presently

without delay, and because the practice had been accordingly, it was awarded, that they pay the money at the days limited in the extent, &c. Fitzh. Tit. Extent, pl. 10. cites Patch. 2 H. 4. 17.

For farther exposition upon the word (*forthwith*) see the statute of 13 E. 1. de Mercatoribus in the note upon the words (reasonable extent).

† But if lands extended at too high a rate be delivered to the extenders, and it falls out that the consignor had only an estate for life, and dies, the extenders shall be no longer charged; for they shall hold them in the same manner as the consignor himself should have held them, in case the extent had been well made, and as long as the tenancy of the franktenement continues in the debtor, so long he should hold till the debt be satisfied. 21 E. 3. 21. a. b. pl. 11.—Br. Extent, pl. 4. cites S. C. but very short.

‡ Br. Statute Merchant, pl. 14. cites S. C.

And if the debtor will say, that his moveable goods were delivered, or sold for less than they were worth; yet shall he have no remedy thereby; for when the mayor or the sheriff has sold them to him that offered most, he may account it his own folly that he did not sell them himself before the day of his suit (when he might, and would not), and have levied the money with his own hands.

A clerk shall not be arrested by his body *And if the debtor have no moveables whereupon the debt may be levied, then shall his body be taken, and kept in prison until he have made agreement.*

upon this statute, and if process be awarded to arrest him by this statute, he shall have a writ unto the sheriff, that he do not trouble or molest him, and if he have arrested him for the same, that he deliver him, if he knows no cause why he should not enjoy the privilege of a clerk. And in such writ there is a proviso put in the end of the writ. F. N. B. 131. (A).

And if he have not wherewith to sustain himself in prison, the creditor shall find him bread and water, which costs the debtor shall recompense him with his debt before that he be let out of prison.

And if the creditor be a merchant stranger, he shall remain at the costs of the debtor, for so long a time as he tarrieth about the suit of his debt, and until the moveable goods of the debtor be sold or delivered unto him.

* See pl. 9. *And if pledges or Mainpernors come before the mayor and clerk, they shall bind themselves by writings and recognizance in like manner, as the debtor. And if the debt be not paid at the day, such execution shall be awarded against the pledges, as is before directed against the debtor.*

S. 2. *Provided, that so long as the debt may be fully levied of the goods of the debtor, the pledges shall be without damage.*

This statute is in Fleta. 138, &c. lib. 2. cap. 64. de debitoribus & creditoribus.—Co. Litt. 289. b. in Marg. cites Fleta, lib. 2. cap. 53. but seems to be misprinted, that chapter being De Curia Baron'.
2. 13 E. 1. cap. 1. *De Mercatoribus ordains, that a merchant, who will be sure of his debt, shall cause his debtor to come before the mayor of London, or before some chief warden of a city, or other town, where the king shall appoint. And before the mayor or chief warden, or other sufficient men chosen and sworn thereto, when the mayor or chief warden cannot attend.*

Litt. 289. b. in Marg. cites Fleta, lib. 2. cap. 53. but seems to be misprinted, that chapter being De Curia Baron'.

* Though the statute says, that he shall be a merchant who shall acknowledge the debt, yet if he be not a merchant he is within the compass of the statute to be a consignor; per Jones J. Winch. 89. in the case of Hickford v. Machin.

Notwithstanding the words are, that he ought to come before (the chief officer) of the city, &c. yet it hath been ruled here, that if the city be governed by a chief officers he ought to come before them both; for to this purpose they are but one; per Jones J. Win. 89. Trin. 22 Jac. C. B. in the case of Hickford v. Machin.—S. P. Ibid. 89. Per Hutton J. in S. C.

And

And before one of the clerks that the king shall assign, when both cannot attend, and acknowledge the debt, and the day of payment. And the recognizance shall be inrolled by one of the clerks hands being known; and * the roll shall be double, whereof one part shall remain with the mayor or chief warden, and the other with the clerks that thereto shall be first named.

+ Though a day of payment be expressed, yet if it be not a certain but a conjectural day only

it is not good, as if it be to be paid at Michaelmas after J. S. shall come to Paul's; in such case, because it may not appear to the mayor judicially when to award execution, therefore it is not good; but if it be to pay the first return of Mich. Term, it is good; because there he may know immediately when to award execution: and the same law, if it be to pay before Mich. next, or to pay presently, as an obligation. and so the mayor is bound to take notice, that this is to be paid presently; per Jones J. Win. 83. in the case of Hickford v. Machin.—Ibid. 84. in S. C. by Hutton J. accordingly, and that it is the same if the payment be expressed to be after the accomplishment of such an age; for those shall never be days to give jurisdiction, though they were good by way of contract; and such a recognizance is good for any thing for which an action of debt will lie, otherwise not, and that so is the statute of 23 H. 8. cap. 6. For it extends not to such things.—And Ibid. 85. in S. C. Winch. J. said he agreed the difference taken that there ought to be a time certain, and not to be proved after by averment.—And Ibid. 86. in S. C. Hobart Ch. J. agreed that there ought to be a time certain for payment, and that is an actual time or a legal time.

And further, one of the said clerks, with his own hand, shall write an obligation, to which the seal of the debtor shall be put with the king's seal, provided for the same intent; which seal shall be of 2 pieces, whereof the greater piece shall remain with the mayor, or the chief warden, and the other piece in the keeping of the foresaid clerk.

And if the debtor do not pay at the day, then shall the merchant come to the mayor and clerk with his obligation. And if it be found by the roll or writing, that the debt was knowledged, and the day of payment expired, the mayor or chief warden shall cause the body of the debtor to be taken (if he be lay) whensoever he happens to come in their power, and shall commit him to the prison of the town, if there be any, and he shall remain there at his own costs, until he has agreed for the debt. And the keeper of the town prison shall retain him, and if the keeper will not receive him, he shall be answerable for the debt; and if he have not whereof, he that commits the prison to his keeping shall answer.

And if the debtor cannot be found in the power of the mayor or chief warden, then shall the mayor or chief warden send into the chancery under the king's seal, the recognizance of the debt; and the chancellor shall direct a writ unto the sheriff, in whose shire the debtor shall be found, for to take his body (if he be lay) and safely to keep him in prison until he has agreed for the debt. And within a quarter of a year after he is taken, his chattels and lands shall be delivered him, so that by the profits he may levy and pay the debt. And it shall be lawful unto him, during the same quarter, to sell his lands and tenements for the discharge of his debts.

And if he do not pay it within the quarter, * all the lands and goods of the debtor shall be delivered unto the merchant by a † reasonable extent, to hold them until the debt is wholly levied. And nevertheless the body shall remain in prison. And the merchant shall feed him bread and water.

* See (E. v) Pl. 11. † Though this statute mentions only that it shall be de-

livered to the creditor upon a reasonable extent, and says not a word that it shall be delivered to the extenders if they value it too high; yet it shall be delivered to the extenders * by the equity of the statute of *Assen. Burnel* made before, which says that goods appraised too high shall be delivered to the appraisors for the price they have set them at, the statute is penal; per Saunders. Pl. C. 81.

b. in the case of Partridge v. Strange and Croker. — S. P. Per Saunders J. Pl. C. 117. a. in the case of Buckley v. Rice-Thomas. — S. P. by Saunders Ch. B. Pl. C. 205. b. in the case of Stradling v. Morgan.

* S. P. Per Cur. J. 188. Trin. 14 Car. B. R. in the case of Whitton v. Weston.

And where the statute of Acton-Burnel says, that if the goods are appraised too high, the appraisors shall be forthwith answerable unto the creditor for his debt, so here in the case of land by the equity of that statute; yet if it be delivered to the extenders, they shall not pay the money till the days assised and limited in the extent, and yet the words of the act are (shall forthwith answer, &c.). But the intent of the makers of the act (as may be reasonably presumed) was not to make them pay immediately, and then they to wait till the time should happen for their receiving it again; for at that rate every one would charge the extenders with the land, and so no one would willingly be an extender, for which reason the judges have expounded the words (forthwith answer) to be intended, that they shall immediately become debtors, and chargeable with the payment at such days as the rents, &c. will be payable and receivable; and so qualified the rigour of the word (forthwith) according to reason, and the presumed intent of the makers of the statute; per Saunders Ch. B. Pl. C. 205. b. in the case * of Stradling v. Morgan. — S. P. Br. Extent, &c. pl. 1. cites 2 H. 4. 17, 18. For the statute is not that they shall (pay forthwith) but that they shall be (answerable forthwith.) Quod nota.

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See (S. 2) — *And the merchant shall have such seisin in the lands and tenements delivered unto him or his assignee, that he may maintain a writ of novel disseisin, if he be put out, and redisseisin also, as of freehold to hold to him and his assigns until the debt be paid.*

Though this statute gives an assise to tenant by statute merchant, yet it does not take away the assise which the tenant of the franktenement had before, but both shall well stand together. 11 Rep. 74. b. Arg. in Dr. Fortier's case. cites 43 Ass. 9.

And as soon as the debt is levied, the body of the debtor shall be delivered with his lands.

And in such writs as the chancellor does award, mention shall be made, that the sheriff shall certify the justices of the one bench, or the other, how he has performed the king's command at a certain day, at which day the merchant shall sue before the justices, if agreement be not made. And if the sheriffs do not return the writ, or do return that the writ came too late, or that he has directed it to the bailiffs of some franchise, the justices shall do as it is contained in later statute of Westminster.

* See (R) per totum. † See (R) pl. 11, 12, 13, 14. — *And if the sheriff return that the debtor * cannot be found, or that he is † clerk, the merchant shall have writs to all the sheriffs, where he shall have land, that they deliver him all the goods and lands of the debtor by a ‡ reasonable extent, to hold unto him and his assigns, and he shall have a writ to what sheriff he will, to take his body (if he be lay) and to retain it in manner aforesaid. And the keeper of the prison must answer for the body or the debt.*

writ upon a statute merchant was returned clerics, and the plaintiff prayed a writ to the bishop to levy de bonis ecclesiasticis, and could not have it, inasmuch as it is not given by the statute, whereupon it was said to him that he should have writ to the sheriff to deliver his lands. Fitzh. tit. Execution, pl. 79. cites Mich. 19 E. 3.

‡ See supra 537. the last note. — A statute extended at a low value of purpose to keep off other extents, the Court ordered that the filing of the extent to be stayed. Toth. 277. cites Harris v. Bayning. 8 Jac. lib. 2 fol. 910.

And after the debtor's lands be delivered to the merchant, the debtor may sell his land, so that the merchant have no damage of the improvements.

See (K. 2) pl. 12. — *And the merchants shall be allowed their damages and costs, labours, suits, delays, and expences reasonable.*

(O. 2) Per totum. *And if the debtor find sureties which do acknowledge themselves to be principal*

principal debtors after the day passed, the sureties shall be ordered as the principal debtor.

And the merchant shall have seisin of all the lands that were in the hands of the debtor the day of the recognizance made, in whose hands soever that they come after, either by feoffment or otherwise. And after the debt paid, the lands and issues shall return again, as well to the feoffee, as the other lands unto the debtors. And if the debtor or his sureties die, the merchant shall have no authority to take the body of his heir, but he shall have his lands * if he be of age, or when he shall be of full age, until he has levied the debt.

Infant brought assise of novel disseisin against A. B. and C.—A. answered as tenant, and said that the father of the infant was

bound to him in a statute-merchant to pay at a certain day, before which day the father died; whereupon A. sued a writ to the sheriff to inquire in whose hands the lands of the father of the infant were, and that he deliver them to him, and the sheriff found the lands in the hands of the plaintiff, and delivered them to him, and so he entered by livery of the sheriff. And B. pleaded nul tort, because he was sheriff, and that what he did was by the king's writ. And C. pleaded nul tort, because he was bailiff to the sheriff, and what he did was by the sheriff's command. It was objected, that the writ by which they excuse themselves gives them no power to take the lands out of the hands of the infant; for the writ has an exception nisi in manibus puerorum infra ætatem existentium, and so prayed judgment of their conscience; whereupon the assise was taken for the damage, which found to the damage of 100s. and it was thereupon awarded that the plaintiff recover seisin of the land and damages, &c. and A. B. and C. in misericordia; and so the sheriff adjudged disseisor, because what he did was without warrant. Fuzh. tit. Assise, pl. 402. cites Temps. E. 1.

* See (H) pl. 9. and (R) pl. 18, 19.

And another seal shall be provided for fairs, and the same shall be sent unto every fair under the king's seal, by a clerk sworn, or by the keeper of the fair.

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And if the commonalty of the merchants of London 2 merchants shall be chosen that shall swear, and the seal shall be opened before them, and the one piece shall be delivered to the aforesaid merchants, and the other shall remain with the clerks: and before them, or one of the merchants, (if both cannot attend) the recognizances shall be taken.

And before any recognizance be inrolled, the pain of the statute shall be read before the debtor.

And to maintain the costs of the clerk the king shall take of every pound a penny, in every town where the seal is, except fairs, where he shall take one penny halfpenny of the pound.

This act is to be observed throughout England and Ireland between any that will make such recognizances (except Jews, to whom this ordinance shall not extend)

And by this statute a writ of debt shall not be abated.

A man may have an ac-

tion of debt upon a statute merchant or staple, or upon a recognizance, or may have execution according to the statute at his pleasure. F. N. B. 122. (D)

And the chancellor, justices of the one bench and the other, the barons of the Exchequer, and justices itinerants, shall not be estopped to take recognizances: but the execution of recognizances made before them, shall not be done in the form aforesaid, but by the law before used.

3. 14 E. 3. Stat. 1. cap. 11. Enacts, that every clerk deputed to receive recognizances in cities and boroughs, shall abide in person to do his office, and shall have lands sufficient in the county, whereof he may answer.

4. 23 H. 8. cap. 6. S. 2. Enacts, that the Ch. J. of B. R. and the

the Ch. J. of C. B. every of them, by himself, and in their absence out of the term, the mayor of the staple at Westminster, and the recorder of London, jointly together, shall have power to take recognizances for debts according to such form as follows:

Noy. 172.
in the case
of BISS v.
WILLS,
says, that
Fenner said,
the statute
de mercato-
ribus [but it
seems he
means this
statute, the
statute de
mercatori-

" Noverunt universi per present', nos A. B. & D. C. teneri
" & firmiter obligari Johanni Style in cent. libr. sterling, solvendis
" eidem Johanni, aut suo cert. attorney hoc script. ostend. hared.
" vel execut. suis in tal. fest. &c. proxim. futur. post dat. præ-
" sent'. Et si defecero, vel defecerimus, in solutione debit' præ-
" dict' volo & concedo, vel sic, volumus & concedimus, quod
" tunc currat super me, hared. & execut. meos, vel super nos,
" & quemlibet nostrum, hared. & execut' nostros poena in statuto
" staple de debit' pro merchandis in eadem emptis recuperand.
" ordinat' & provis'. Dat. tali die anno regni regis, &c."

bus 13 E. 1. having not the word (sterling) as I can find in it] is, that the manner of the recognizance shall be of (money sterling); but he said, it is sufficient if it be of (lawful money;) to which Clench agreed.

Though the first words of a statute staple are joint, yet where these words follow, viz. *si defecerimus volumus, &c. quod currat super nos & quemlibet nostrum*, this makes it several; and this being according to the form set down in the statute of 23 H. 8. cap. 6. the Court resolved it was joint and several: and judgment accordingly. Freem. Rep. 128. pl. 149. Mich. 1673. Rogers v. Danvers.

S. 3. Every obligation made according to this act shall be sealed with the seal of the party and also with such seal as the king shall appoint, with the seal of one of the said justices, or with the seals of the mayor and recorder, and with their names subscribed that shall take the recognizance; and the justices, mayor, and recorder shall have the custody of one such seal, which shall severally remain with them.

* See pl. 5.
the stat. of
8 Geo. 1.
cap. 25. in-
fra.

[540]

S. 4. Such person as shall be assigned by the king shall write all such obligations, and cause the same to be inrolled in 2 rolls indented, whereof one shall remain with the justices, or with the said mayor and recorder that shall take the recognizance, and the other with the writer; and the person appointed for writing and inrolling such obligations, or his deputy, shall dwell in London, upon pain to forfeit for every time that he shall be absent 2 days 10l.

S. 5. The person assigned to write and inrol such obligations, at the request of the creditors, shall certify such obligations into the Chancery under the seal of the said person.

S. 6. Every person to whom such obligation shall be made for default of payment, shall have like process and execution, as has been used upon any obligation of statute staple.

S. 8. Every person that shall have process for execution by reason of any such obligation, shall pay to the king at the time of the sealing of the process, one halfpenny for every pound contained in the obligation.

S. 10. Every of the said justices, and the said mayor and recorder, before whom such obligations shall be recognized, shall take for knowledge of every such recognizance 3s. 4d. and the clerk that shall write and inrol the same 3s. 4d. and for the certificate of every such obligation 20d. and if any of the said justices, mayor, recorder, or clerk, take above the sums limited, they shall forfeit 40l.

S. 11. No mayor or constable of the staple for the payment of money, shall take any recognizance of the statute staple, upon pain to forfeit 40l.

the

the one moiety of the said penalties to be to the king, and the other moiety to the party that will sue for the same; provided that this act be not hurtful to any mayor and constables of the staple, for any bond of statute staple taken between merchants being free of the staple, for merchandize of the staple between them bought and sold.

But it is thought that the laws of the staple are obsolete since the taking of Calais.

5. 8 Geo. 1. cap. 25. S. 1. Enacts that the rolls appointed by 23 H. 8. cap. 6. to be made of recognizances in nature of a statute staple, shall be made in manner following, viz. the clerk of the recognizances, or his deputy, shall yearly prepare 3 parchment rolls, and shall at the times of acknowledging every recognizance ingross the full tenor of such recognizance, and one of the rolls shall contain all the recognizances taken before the Ch. Justice of B. R. and one other of them all the recognizances taken before the Ch. Justice of C. B. and the other all the recognizances before the mayor of the staple at Westminster, and recorder of London; and at the time of such acknowledgment the persons before whom such recognizances shall be taken, and also the party acknowledging, shall sign their names to the roll, as well as sign and seal the recognizance, and all the three rolls shall, at the end of every year, be fixed together and made one roll, and remain in the custody of the clerk of the recognizances, in his publick office in London or Middlesex, who shall keep a docket to refer to the rolls, to which docket shall be added the day, month and year of every acknowledgment.

S. 2. In case any loss shall happen to any such recognizance, the same shall, from any of the rolls, be by the clerk, by certificate under his seal, certified into Chancery, and to such certificate, and all certificates of such recognizances, shall be annexed a transcript of the entry from the rolls, and a like certificate, with such transcript annexed, shall be made, and remain with the clerk of the petty bag, and shall be as effectual as if the recognizance under seal had been left in the office; and in case of loss, a copy from the rolls, signed by the clerk, and duly proved, shall be evidence of such recognizances.

S. 3. The prosecutor of every such recognizance, shall, at the time of suing out the first writ of extent, deliver into the office a note, testifying the sum of the damages intended to be levied, which sum the officer shall insert in the writ; and the poundage of one halfpenny shall be taken only for every pound, according to the sum so inserted.

S. 4. In case it shall at any time before or after the filing or returning of any liberate, be made appear to the Chancery that sufficient has not been levied to satisfy the recognizance, or that any omission or error has happened in suing out, executing or returning any of the said writs, or any process thereon, or that any lands shall be evicted from any person who shall have extended the same by virtue of such process, the Chancery shall award re-extents for satisfying the same, and writs of liberate may be sued out thereupon.

S. 5. No sheriff shall take for the extent and liberate, and habere facias possessionem or seisinam on the real estate, and levy on the personal estate by virtue of such extent, any more than the fees appointed by 3 Geo. 1. cap. 15. for executing a writ of elegit and habere facias possessionem or seisinam, under the like penalties.

(F) Statute

[541]

(F) Statute Merchant, and Staple, Recognizance.
What shall be a good Statute.

If by the
statute it
appears
when the
money is to

[1. **I**F a statute be payable *cum requisitus fuerit*, it is not good, because it ought to be [at] a day certain. Tr. 11 Jac. B. Per Curiam.]

be paid, though *no day in certain* be put, it is good enough, and within the intention of the statute; per 3 Just. against Hutton. Jo. 52. Mich. 22 Jac. C. B. Maskeline v. Higford. — Bridgm. 19. S. C. by name of Melkin v. Hickford accordingly, with the argument of the several judges. — S. C. Winch. 82. by name of Hickford v. Machin. — Chan. Rep. 28. 4 Car. 1. Davis v. Higford, S. C. — Hutt. 42. Davis's case, S. C. accordingly. — But Jo. 1. Pasch. 18 Jac. Matthew v. Davis, S. C. This statute was adjudged void per tot. Cur. prater Jones, and a supersedeas was awarded of the extent.

A statute
ought to
have two
seals; and
if issue be

[2. To a statute merchant, there ought to be *the seal of the party* who obliges himself, and *the seal of the king* provided to it. 15 H. 7. 16. and this by the words of the statute.]

joined, whether a statute had two seals, or not, it shall be tried per Pais, and not by certificate of the mayor. For this is a matter in fact, and no parcel of the record. Cro. E. 233. pl. 4. Pasch. 33 Eliz. C. B. Afcue v. Fuliambe. — Le. 228. pl. 310. S. C. accordingly. — Cro. E. 319. pl. 6. Pasch 36 Eliz. B. R. Fulshaw v. Afcue, S. C. and the S. P. was affirmed in error. — But though it be not good as a statute, yet debt lies upon it as upon an obligation. Cro. E. 355, 356. pl. 14. C. B. Hollingworth v. Afcue. — Ibid. 461. pl. 7. Hill. 38 Eliz. B. R. and 494. pl. 12. Mich. 38 & 39 Eliz. B. R. Afcue v. Hollingworth, S. C. affirmed in error. — The statute merchant has the seal of the party with the seal of the king, and the party may use it as an obligation, and bring debt thereupon, and refuse the execution given by the statute; but otherwise it is of a statute staple, for there is only the seal of the king, and there he shall have no other remedy than what is given by the statute: but otherwise it seems upon the new statute which is given by 23 H. 8. in nature of a statute staple, because there the seal of the party is put also. Br. Statute Merchant, &c. pl. 16. cites 15 H. 7. 14. Dupleg v. Debenham.

[3. A statute merchant ought to be sealed by the party, otherwise it is not good. 6 R. 2. Execution 131.]

[4. [But] to a statute staple, there needs not the seal of the party, but only the seal of the staple provided for it. 15 H. 7. 16.]

[5. [But] to a recognizance in the nature of a statute staple taken by force of the statute of 23 H. 8. there ought to be the seal of the confessor, the seal which the king has provided for it, and the seal of the Ch. J. or mayor or recorder who shall take it; and this by the express words of the statute.]

6. Nota, that all recognizances upon statute merchant made after the 5 E. 3. must be made in the presence of four at least, who are not parties to the recognizances. Regist. Brev. 147.

[542] (G) *Who shall have Execution. [And how.]*

[1. **A**PRIORESS to whom a statute merchant was acknowledged, shall have execution of the land of the debtor. 15 E. 3. Execution 65]

Fol. 467.

[2. If 2 confessee sue execution of a statute merchant, and the sheriff returns the confessor dead, by which execution is awarded, and

and one of the conusees says that the other is dead since the suit commenced, and prays execution alone, he shall not have it, but ought to sue in Chancery to have a writ to the Court of Bank in his case 25 E. 3. 38. adjudged. (But it seems it is admitted that he shall have execution alone, but he ought to have it upon such new writ.)]

S. P. Greenw. of Courts 150. Tit. Recognizance, cites 1 25 E. 3. Execution 92.—But

if two sue execution, and before the extent one dies, the sheriff shall extend the land, and shall deliver the land to the other. Ibid. cites 11 R. 2. Brief 938. — Two conusees of a recognizance, scire facias issues out, and judgment thereupon, elegit goes out in both their names, and so by several continuances till one conusee dies. Adjudged that execution by the surviving conusee is good enough without a scire facias, an alias elegit may be taken out, and the execution good. Cart. 193. Law v. Tookhill.

[3. If the conusee of a statute merchant sues a capias (after a certificate in Chancery) out of the Chancery returnable in bank, and a non est inventus is returned there, upon which an execution is awarded, but before it is executed the conusee dies, and the executor comes and prays execution, or a scire facias against the tertendants, because (as it is there said) he cannot have a new capias out of the Chancery upon the said certificate, because it is of record that execution is once awarded, yet the executor shall not have execution, nor any scire facias, because the first suit is abated by the death of the testator, and the executor must make a new suit, and ought to sue out of the Chancery an action upon his case, directed to the Court of Bank. 18 E. 3. 10. b. adjudged]

If conusee upon statute staple dies, his executors may come into Chancery, and shew the statute and the testament, and shall have execution without a scire facias. Otherwise

it is where one recovers at common law, and dies, there his executors are put to their scire facias; but upon statute merchant or staple, he shall have such execution only as the statute appoints, and no other; per omnes justiciarios. præter Brian; but per Hussey J. if a man sues execution up in statute staple in Chancery, and the sheriff returns the obligor dead, he shall have scire facias, because it comes upon return of the sheriff, and not directly upon the statute; ad quod non fuit responsum. Br. Statute Merchant, pl. 16. cites 15 H. 7. 14.

[4. [So] if the conusee sues execution by capias returned in bank, and upon non est inventus returned, sues an alias capias in bank, before the return whereof he dies, his executor shall not have any scire facias against the conusor, but ought to commence all de novo in Chancery. D. 2 El. 180. 49.]

But if a man be bound in a statute merchant in sol. and the statute,

at the suit of the recognizee, is certified in the Chancery, and afterwards he dies, his executors may have a special writ unto the mayor, reciting the certificate before them, commanding them to certify the same again into the Chancery. F. N. B. 131. (B)

But this writ is not granted but upon affidavit and oath made by the executors in Chancery, or by him who would have that execution. F. N. B. 131. (A) [This is misprinted in the last edition, and should be (C) as it is in the former editions.]

[5. So in the said case the executor shall not have writ of extendi facias, as the conusee should have if he had been alive, because the suit is determined, and he ought to commence all de novo. D. 2 El. 180. 49. And there said, that where in the book of 17 E. 3. 31 in a nota, it is said that the executors prayed execution in such case, and had it, and so is Fitzherbert in abridging this title that the word (habuerunt) is not in the written book of T. Cargrave.]

See (K) pl. 7.

[6. If A. acknowledges a recognizance in nature of a statute staple to B. who dies, and after C. his executor sues execution in Chancery

[543] Jo. 386. pl. 1. Pasch.

28 Car. B. R. S. C. accordingly, by Jones and Barkley J. contra Crook J. (absente Brampton Ch. J. in the Court of Wards) and Crook's reasons were, that though upon a judgment obtained by an executor, who after dies intestate, his administrator should not

Chancery by writ of *extendi facias*, and after before the return of the writ, and before any inquisition or extent taken by the sheriff, *C. dies intestate*, and then administration is granted to *D. of the goods of B. not administered by C.* and afterwards the sheriff extends the lands of *A.* and seises it into the hands of the king, and returns this, and upon a liberate sued by *D.* the land is delivered to him in extent; this is a void extent, because the writ of *Ex-tendi facias* sued by *E.* the executor, was to extend the land to seise [it] into the hands of the king, *ut ea præfato executori quousque, &c. Liberari faciamus*; so that this was the writ of the executor, which was abated in fact by his death before any thing was done upon it, and then all void which ensues upon it, and the administrator comes in paramount the writ, and not privy to it. P. 11 Car. B. R. between *Vere and Clive*, adjudged by the whole Court, except Croke; upon solemn argument at the bench after arguments at the bar, upon a special verdict; but Croke was against the judgment, for all the Court, except Croke, held it to be all one with an execution upon a statute merchant. Intratur. Tr. 11 Car. Rot. 1378.]

have benefit of it, yet otherwise it is upon extent, because no process of *scic fa.* is requisite upon an extent, as it is upon a judgment; and that in this case the extent was good, notwithstanding the death, because there was a difference between this case (which was of a recognizance in nature of a staple) and execution upon a statute merchant, in which case the death of the executor is not pleadable, neither can the sheriff take notice of the death, or return that he is dead. But Jones and Barkeley were of a contrary opinion, and that there was no privy, that the administrator came in paramount the executor, and that the sheriff had no power now to make the extent; for the writ was abated, and here was a discontinuance, and that the administrator must have a new certificate, or at least a new writ of extent, and this upon construction of the statute staple, and 23 H. 8. and 13 E. 1. De Mercatoribus, and all the books; and that there was no difference between the case of statute merchant and of this statute, as to this point. And of this opinion was Brampton; whereupon judgment was given for the plaintiff. And Saunders, who had been clerk of the petty bag many years, and had great experience as to extents, certified his opinion in writing, that the extent in this case made after the executor's death, and the liberate made afterwards to the administrator, were void, and that the administrator ought to have an extent *de novo*, and thereupon to have a new liberate. — Cro. C. 450. pl. 23. Hill. 11 Car. B. R. S. C. with some reasons of the said judges pro and con. but adjournatur. — Ibid. 457. Pasch. 12 Car. B. R. S. C. with the arguments of the said judges, and says, that Brampton having delivered his opinion unto Jones J. that the extent was merely void, judgment was entered accordingly.

[7. Upon a recognizance in nature of a statute staple, if the conusee dies, and B. his executor sues execution, and upon this the land of the conusor is extended and seised into the hands of the king, and after B. dies intestate, the administrator of the goods not administered by B. shall not have any liberate thereupon, because the suit was abated by the death of B. and the administrator comes paramount the extent. P. 11 Car. between *Clive and Vere*. Dubitatur among the justices]

*Fol. 468. [8. If conusee of a recognizance, in nature of a statute staple, sues execution, and after the extent made, and seisure into the king's hands, the conusee dies; it seems his executor shall not have a liberate upon it, because the suit was abated by the death of the conusee, and his executor ought to commence *de novo*.]

Vavisor said that he saw where the recognizance

9. It is a common course, that every stranger, who comes with the statute, shall have execution upon it in the name of the recognizer. Greenw. of Courts 146. Tit. Statute Merchant.

10. Upon

which died, and a stranger came in his own name, and showed the statute, and had execution, although the other came not in proper person. Ibid. cites 12 E. 4. 10, 11. Execution 14.

10. Upon a statute made to two, if one comes with it, he shall have execution in both their names. Greenw. of Courts 146. Tit. Statute Merchant, cites 12 E. 4. 10, 11. Execution 14.

11. It was said for law, that if the conusee upon a statute staple [544] dies, and his executors sue execution in the name of the testator, as if he was alive, and the sheriff takes the body in name of the testator, &c. yet this is not execution for the executors, but they may after have execution in their own names; for the first execution in the name of him who was dead before the teste of the writ was void, and the body cannot remain to satisfy him who was dead before, nor the sheriff cannot deliver the land nor goods to him who is dead, according to the form of the writ. Br. Statute Merchant, pl. 43. cites 36 H. 8.

(H) Against whom Execution shall be granted.
[And of what, and how.]

[1. UPON a statute merchant, if it be returned that he is a clerk, no execution shall be granted to levy it *de bonis ecclesiasticis*; for this is not given by the statute. 19 E. 3. Execution 79.]

[2. But in the same case it shall be granted to levy of his land. 19 E. 3. Execution 79.]

[3. If baron and feme acknowledge a statute merchant, and the feme dies, not having any land, the land of the baron shall be extended for the whole. 14 E. 3. Execution 73.]

[4. [And] if baron and feme acknowledge a statute, and the feme dies, whether the land of the feme may be extended as well as the land of the baron. Fitzherbert, Title Execution 73. in abridging 14 E. 3. makes a quære of this.]

[5. If three bind themselves by a statute merchant, execution may be sued against one of them only, or against all, at the will of the conusee, but not against two of them. 34 E. 3. Execution 129.]

S. P. Green.
of Courts
147. tit.
Statute Mer-
chant.—

S. P. And

so of an obligation; but if he bring debt against them all upon a joint bond, the execution shall be against all; but if he bring it by several præcipes, he shall not have execution but against one. Greenw. of Courts 150. cites tit. Recognizance, 14 E. 3. Execution 129. and 14 H. 4. 19. Execution 29.

Where two were conusees, and process was continued till one of them was taken, and his lands delivered, and he prayed a writ to take the body of the other; so that the other might bear his proportion in the charge. Shard asked how this could be without the suit of the plaintiff. It was answered for the defendant, that it was not reasonable for one only to be charged, and therefore prayed the writ, and said that the plaintiff had elected and commenced his suit against both, and after the writ was granted. Fitzh. tit. Execution, pl. 48. cites Mich. 16 E. 3.

[6. Upon an execution out of a statute merchant acknowledged by six, if the lands and goods of two only are delivered, the said two may have a writ to the sheriff to deliver also the lands and goods of the other four. 29 E. 3. 7. b.]

[7. And

[7. And in the said case if the sheriff returns a *non sunt inventi*, yet the said two shall not have a writ to deliver so much of their lands to them, as amounts to their proportionable part in aid of the said charge of the said two. 29 E. 3. 7. b.]

[8. But in the said case upon garnishment of the conusee, *the conusee shall be compelled to sue execution of the other lands against the four*, or otherwise the two shall be discharged, having regard to their portion. 29 E. 3. 7.]

As scire
facias was
sued upon
a recogni-
zance
against R.P.

9. A man shall not have execution upon a statute merchant against the heir of the conusor within age; nor against the feme of the conusor. Br. Statute Merchant, pl. 33. cites 8 E. 1. and Fitzh. Aff. 417.

and A. of lands which were J. B.'s the conusor's. R. P. said, that he held the lands in ward, by reason of the nonage of W. B. son of J. B. the conusor, and A. said, that she was wife of the [545] said J. B. long before he acknowledged the recognizance, and held in dower; all which the plaintiff confessed to be true, and thereupon it was awarded, that R. P. and A. cant sine die; for the tenant of the franktenement ought to be warned, and if he had been warned, the parol had demurred during his nonage, &c. Fitzh. tit. Execution, pl. 77. cites Hill. 12 E. 3.

So where A. seised of lands made a *feoffment in fee*, by deed indented, rendering rent with a clause of distress, and after became bound in a statute, and the day being incorred, execution was awarded to the conusee, and upon the extent, the sheriff returned that the party was dead, and that he had extended the rent, the heir of the conusor being within age; whereupon the heir brought audita querela. And per Dyer, the writ is well enough maintainable, because there is an exception in the writ of extent, that if the lands are descended to any infant, the sheriff shall surcease to extend; and though this writ issued against the conusor himself, yet when it appears by the return of the sheriff, that he is dead, the infant shall be aided by an audita querela, or otherwise the extent shall be void; because it is made upon the infant's possession. Mo. 37. pl. 121. Trin. 4 Eliz. Anon.

If two conusors of a statute are, and one dies, his heir within age, the extent shall stay, because *usura non currit contra heredem infra aetatem existentem*. And Richardson Ch. J. said, that in this respect the statute is an ill assurance. Litt. R. 72. Mich. 3 Car. C. B. and cites 17 Aff. 24. Anon. per Mowbray.

J. S. seised of land in fee, made his wife a jointure, and then acknowledged a statute, and died, leaving issue a daughter, his heir within age; and the land was extended upon the possession of the feme. It was resolved, that the extent is void as to the feme, and cannot prejudice her title which is paramount the statute. And it was said, that if the feme dies, yet the lands cannot be extended so long as they are in the hands of an infant. 2 Sid. 86. Trin. 1658. Street v. Ld. Roberts. — See (R) pl. 19.

In assise, if
the tenant
in tail binds
himself by
statute mer-
chant, and
dies, and
execution is
sued against

10. In assise, if tenant in tail is bound in a statute merchant, and dies, and the heir in tail enters and infeoffs W. S. the conusee shall have execution against the feoffee. 19 E. 3. Brook says, *quod mirum!* For it is agreed there, that in this case a rent-charge is determined. Br. Statute Merchant, pl. 19. cites 14 Aff. 4.

the heir in tail, there the heir in tail may have assise; for this is a *disseisin to him*; and so see that the heir in tail shall not be bound by the statute of his father tenant in tail, and upon such execution he is not warned, nor has day in Court to plead, therefore assise lies. Br. Statute Merchant, pl. 20. cites 17 Aff. 21. — Br. Assise, pl. 213. cites S. C. — Br. Assise, pl. 279. cites Pasch. 18 E. 3. that the heir in tail recovered by assise, because he was ousted by a statute merchant, acknowledged by his ancestor. — S. P. Br. Statute Merchant, pl. 26. cites 28 Aff. 7.

11. If a man be in execution upon a statute, and finds bail, and does not appear at the day, but at another day the bail brings him in: now it is in the election of the plaintiff to take execution of his body and land, or to take the bail. Greenw. of Courts 150. tit. Recognizance, cites 59 E. 3. Execution 43.

12 Where

12. Where *conusor* upon a statute merchant *makes feoffment of nineteen acres to nineteen persons severally, and permits a 20th acre to descend to his heir, and dies, the conusee shall not have execution against the heir alone, nor against any of the others alone, but against every one for his portion.* Br. Statute Merchant, pl. 6. cites 48 E. 3. 5. per Finch,

Brooke makes a quære, if the conusee himself was alive, and parcel of the land in his hands;

and says, it seems that execution might be against him alone. Ibid———Br. Voucher, pl. 38. cites S. C.

13. A man sued *execution* upon a statute merchant, and had execution, and the *conusor brought audita querela, and found mainprize for the sum in the statute to appear de die in diem till judgment given, and after the parties were at issue, and the conusor at the appearance of the inquest appeared, and challenged, and after, when they came to give their judgment, he was nonsuited, by which the conusor prayed execution against the mainpernors, and of the body of the conusor, and was denied; and it was awarded that he shall not have the one and the other, by which he took execution of the body, land and goods, quod nota; per Cur.* Br. Statute Merchant, pl. 7. cites 50 E. 3. 12.

14. If A. and B. are *bound in a statute staple jointly, and not severally, and A. dies, and B. survives, there B. must be charged out of his own estate, and the executors of A. are not chargeable.* Agreed. Freem. Rep. 128. pl. 149. Mich. 1673. in case of Rogers v. Danvers.

(I) At what Time Execution may be granted.

[546]
Sec (R)

[1. **U**PON a statute merchant, if *the monies are to be paid at two terms, and the one term is past, upon certificate made a writ may be awarded to take the body before the last term is come, and execution thereupon of lands and goods upon return of non est inventus.* 15 E. 3. Execution 61.

S. P. F. N. B. 130. (H)—
Br. Statute Merchant, pl. 39. cites S. C.

2. Execution by *default* was awarded of a recognizance made in C. B. The *party prayed execution of the lands, which the conusor had the day of the recognizance acknowledged, but could not have it, till the sheriff had returned quod nihil habet whereof execution might be made, and then he should have it, and not before.* And this was the advice of all the Court, &c. 29 E.

Fitzh. Tit. Execution, pl. 158. cites S. C.

3. 32. 2.

3. *The year and day of the recognizance shall be accounted, as to the suing of scire facias thereupon, from the day of the payment of the sum, and not from the day of the recognizance acknowledged,* Br. Recognizance, pl. 17. cites F. N. B. 266.

4. A statute acknowledged upon lands is a *present duty, and ought to be satisfied before an obligation* which is not so; (Mich. 23 Car. B. R.) for a debt due upon an obligation is but a chose in action, and recoverable by law; and not a present duty due by law, as a debt upon a statute, judgment or recognizance is, upon

which present execution is to be taken without further suit.
2 L. P. R. 536. Tit. Statute Staple and Merchant.

Sec (R) (K) Statute Merchant, Staple or Recognizance.
How it shall be put in Execution.

[1. **E**XECUTION of a statute merchant or staple ought not to be granted in Chancery upon *certificate of the mayor*, without *shewing forth the statute*. Title Execution 77. in abridging 2 R. 3. in the end.]

[2. See 7 H. 6. 42. When the plaintiff recovered the statute in detinue, and it [was] delivered to him, he sued execution, by which it implied, that he ought to *shew the statute*.]

* If the sheriff has returned *cepi corpus*, and has the body here, if he do not *shew*

[3. But see 26 H. 6. Execution 6. If the *day of payment be past*, and *statute is certified by the mayor*, he shall have execution without shewing of the statute. * But at the day of the return of the writ of execution, if the *party be taken*, if he does not *shew the statute* he shall be delivered.]

the *statute*, the party shall be discharged, although it be lost. Greenw. of Courts 146. Tit. Statute Merchant cites 37 H. 6. 6. and 7.

Fol. 469. [4. If upon a *capias* awarded out of the Chancery upon a statute merchant, returnable in Bank or Banco Regis, the sheriff returns, *quod mortuus est* or * *non est inventus*, no execution shall be granted there for the body, lands, or goods, without *shewing of the statutes*. Old entries, Statute Merchant 596. diverse precedents; and that when he had it not ready at the same day, day [was] given to him to *shew it*.]

* S. P. Greenw. of Courts 146. Tit. Statute Merchant, cites 37 H. 6. 6, 7.

[547] [5. Upon a statute merchant *one writ* may be awarded to *take the body in one county*, and also a writ to the sheriff of another county to make execution of his land. 41 E. 3. Execution 38.]

But if two sue execution upon a statute staple, and one prays extent in one county and the other in another county, they shall not have it. Fitzh. de Extent, pl. 9. cites Mich. 11 E. 4. 9. Per Choke.

[6. If a statute merchant be acknowledged of 100*l.* the consuee may apportion the said sum, and have execution for 20*l.* in one county and 20*l.* in another county, and so several executions in several counties for body, lands, and goods, according to his apportionment. 16 E. 3. Execution 49. 15 E. 3. Execution 60. He had execution of one moiety in one county and of another moiety in another county. Old entries, statute merchant 596. a. b. When the return is *mortuus* then execution is for lands and goods, but when the return is *non est inventus* it seems it may be body, lands, and goods, or for lands and goods only, as there it was. 596. a.]

Though the printed book and Fitzh. Abridg-

[7. If upon the certificate upon statute merchant a *capias* is awarded, and a *non est inventus* is returned thereupon, by which execution is awarded, and before execution made the consuee dies, the

the *executor* of the conusee, upon shewing of the will and statute, shall not have *new execution upon this*; because, for any thing appearing to the Court, it may be, that execution was made to the testator, and then it is not reasonable that it shall be levied again; and the first suit is determined by the death of the testator, and he cannot have at another time a *capias* out of the certificate, inasmuch as it appears of record in bank, that execution was once awarded: but in this case he must *sue a writ out of Chancery*, returnable in bank upon the case. 18 E. 3. 10. b. 2 El. D. 180. 49. He must commence all anew with a new certificate of the mayor, and shall not have *scire facias* nor extent in bank. And there it is said, that 17 E. 3. 31. in a nota [is] misprinted, the word (*habuerunt*) not being in a manuscript.]

ment are, that the executors prayed execution et habuerunt, yet in T. Gargrave's written book the word (*habuerunt*) is wanting; and afterwards it was agreed clearly per Cur. that

no *scire facias* lay in such case; but if any process should be made, it should be such as the conusee ought to have had if he had been living, viz. An *extendi facias*: and so A. Browne held strongly, but Dyer and Weston contra; because there is a special writ in the register, that the executors of the conusee, upon affidavit in Chancery, that the debt was not satisfied in *vita testatoris seu postea*, should have a new certiorari to the mayor, &c. to make a new certificate of the statute, notwithstanding the first certificate. At last the party was advised to commence all *de novo*, that being a clear and sure way without error. D. 180. b. pl. 49. Pasch. 2 Eliz. Anon.

[8. If two conusees of a statute merchant *sue execution*, and the conusor is returned dead, by which execution is granted, and after one of the conusees says, that the other is dead, yet he shall not have in bank execution alone, but he must *sue out a new writ out of the Chancery* upon his case. 25 E. 3. 38. b. Adjudged.]

[9. But by the statute of 5 H. 4. cap. 12. it is enacted, that when a statute merchant is certified into the Chancery, and thereupon a writ is awarded to the sheriff, and this returned in bank, and the statute there once shewn, though the process after the said shewing be discontinued, &c. that the justices of the bench where the statute was once shewn, may, upon the same record, make and award full execution of the said statute without having the view or monstrans of it at any other time afterwards.]

[10. If G. B. Esq. is bound in a statute merchant to J. S. and after G. B. is made a knight and baronet; and upon certificate made by the mayor in the Chancery, B. takes out of the Chancery a *capias* against G. B. by the name of G. B. Esq. as he was named in the statute, and this is returned in bank, upon which writs of extent are awarded to several counties, which were executed and returned: this is not good, nor can be amended; but B. may *sue a new capias out of the Chancery upon the first certificate against G. B. knight and baronet, qui per nomen G. B. armiger cognovit*, &c. Hobart's Reports 173. Sir George Grisley's case. Adjudged.]

Hob. 129. pl. 168. S.C. accordingly; for this was [548] matter that must come of the information of the party. • Fol. 470.

[11. Upon a certificate of a statute merchant if a *capias* be granted to the sheriff of L. who returns, *non est inventus*, and after another certificate is made, and thereupon a *capias* granted to the sheriff of S. by which his body is taken: this is not good; for the second certificate and process thereupon is not grantable by law. 28 E. 3. 91. b. Adjudged. But they would not deliver his body, and made quære.]

Fitzh. tit. Execution, pl. 93. cites S. C.

Fitzh. tit.
Execution,
pl. 91. cites
S. C.

[12. Upon a statute merchant the writ of extent may be granted to the sheriff of the county where the statute was acknowledged, and to any other counties also at the same time. 24 E. 3. 30. Execution 91. But I do not find this in the book at large.]

F. N. B. 132.
(B) in the
note in the
marg. cites
S. C. and
says, note it
cannot be
intended
but that
they were
three several
statutes.
—[But this
note is not
in the
French
edition.]

13. Upon certificate of statute staple made by the mayor of the staple in Chancery, the conusee took a writ for the body, and to extend the land in S. and M. only, which writs were not returned; and therefore he caused the mayor of the staple to certify the statute again by certiorari; and upon this took writ for the body, and to extend the land in ten counties, but not in S. and M. which were not returned; by which he took the third certificate, and took execution in six counties, but not in S. or M. and had land extended, which the conusor had in jure uxoris, which feme died within the term, and the conusor menaced the conusee so that he durst not take the profits: and by all the justices, where the conusee is ousted by the death of the feme, or by menace, as above, the conusee shall have *capias* in the county where he took the first writ, and not in another county, and this upon a new certificate; and upon this the conusor shall have answer, and shall find surety to the king and parties according to the statute 11 H. 6. 10. and shall have *scire facias* against the conusee, and shall find surety to sue it with effect, and to prove the matter contained in the writ, and to stand to the judgment of the Court; and if he fails in any of those he forfeits his recognizance to the king and to the party: and the sureties shall be sufficient as well for the greater sum as for the costs and damages. Br. Statute Merchant, pl. 36. cites 2 R. 3 7.

So of a statute
staple.
Or the
mayor of
the staple
may award
execution if
the party be
dwelling
within his
jurisdiction,
or has lands
or goods
there, &c.
F. N. B. 131.

14. A writ of execution upon a statute merchant lies in a case where a man is bound in a statute merchant before any mayor or bailiff of a corporate town, who have power to take such bonds or recognizances, to pay a certain sum of money at a day, at which day he does not pay the same, then he to whom the obligation or recognizance is made may come before the mayor or him before whom the bond or recognizance was taken, and pray him to certify the same into Chancery under his seal, according to the statute of *Acton Burnel*; and if he will * not certify the same, as he ought to do, then the recognizance may have a writ directed unto the mayor.

F. N. B. 130. (C)

(C)—Ibid. in the new notes there (b) there is a note, that execution by a mayor of the staple can be only within his jurisdiction.

* So if upon a statute staple the mayor will not certify the same, then the party who has the obligation may come into the Chancery and shew the same there, and pray a certiorari to the mayor to certify the enrolment of the statute; and if the mayor returns, that he has twice or oftener certified the same before that time, as appears by the enrolment made by the mayor, if there appears no such certificate upon record in the Chancery, then he who has the bond of the statute may sue for a new certiorari to the mayor, reciting in the writ, that there is not any certificate recorded in the Chancery, commanding him to certify the enrolment of the statute which is before him; and upon the same he may have an *alias* and a *pluries* against the mayor, if he will certify the same, and also an attachment against the mayor, directed to the sheriff, &c. F. N. B. 244. (D)

[549]
So upon a
statute sta-
ple; and

15. And if he will not certify by this writ he may sue an *alias* and a *pluries* and attachment, against the mayor and clerk: and it appears by this writ that if an obligation be once certified in the Chancery

Chancery it ought not to be certified again without affidavit, when the made, that execution was not sued upon it, and then he shall have a special writ unto the mayor for it; for then it shall be taken as a several obligation upon every certificate. F. N. B. 130. (D)

when the mayor has certified the statute under the seal, then the

writ of execution shall issue forth against the party to arrest him, and to extend his lands, &c. F. N. B. 131. (C)

16. And also it ought to be certified under the seal of him who is deputed to seal the obligation. And if the mayor do make his certificate unto the Chancery, then the party shall have a writ to execute the statute. F. N. B. 130. (E) (F)

17. If the statute be not sufficiently certified in the Chancery by the mayor, &c. because he has omitted any part of the bond, as the name or surname, or other matter material, then upon affidavit made, that he has not had execution by reason of that certificate, he shall have a new writ unto the mayor and clerk, &c. to certify the statute fully again into the Chancery, notwithstanding his certificate made before, and that writ does appear in the register. F. N. B. 132. (B)

18. If the mayor makes a certificate of the statute into the Chancery and delivers the same unto the recognizer, and the party keeps the certificate, and will not put it into the Chancery, and afterwards another is made Chancellor, the party ought to have a new certificate to that Chancellor, otherwise he shall not have execution of the statute upon that certificate made to the old Chancellor, which was not delivered in time into the Chancery; and then he ought to sue a writ in Chancery, directed unto the mayor, to make a new certificate. F. N. B. 132. (B)

But note, that if in the first certificate he has not expressed the name of the Chancellor, then he may deliver that certificate to the new Chan-

cellor, and sue execution upon it, and therefore it is good to make the certificate general to the Chancellor without naming his name. F. N. B. 132. (B)

19. It was said by the Court, that in an execution upon a statute merchant, there is no occasion for a liberate as there is upon a statute staple: and in this last case the cognizee cannot bring an ejectment before the liberate; neither can the sheriff, upon the liberate, turn the tertenant out of possession, as he is to do upon an habere facias possessionem. Vent. 41, 42. Mich. 21 Car. 2. B. R. Anon.

(L) Discharging of Statute Merchant. Before Execution.

[1.] IF a man acknowledges a statute to A. and after acknowledges another statute to B. and then accepts a lease for years of the land, and grants it over to another; by this he has suspended his statute during the lease for years, and the second conusee may well extend the land upon the lessee. Tr. 15 Ja. B. R. Harrington and Garroway, adjudged upon special verdict

Cro. J. 424. pl. 9. Pasch. 15 Jac. S. C. adjudged accordingly, without much argument; for by the

acceptance of the reversion and P. 16 Ja. B. R. the same case between the same parties adjudged again.]

rent, and assigning it over the extent is suspended during the term.—Ibid. 477. pl. 11. P. 16 Jac. B. R. S. C. accordingly.—Ibid. 569. pl. 9. Patch. 18 Jac. in the Exchequer Chamber. Garraway v. Harrington, S. C. and the judgment was reversed, but it was upon a different point in the pleading.—Palm. 272 S. C. Hill. 19 Jac. B. R. that by the purchase of the reversion and rent his statute was extinct, and that the second conusee may extend. And have action of debt for the rent, and is not put to audita querela, though the first conusee should extend [550] also, the extent being void; but it would be otherwise if it were only voidable ex post facto. And it was affirmed by the plaintiff's counsel, that this case in both points had been adjudged in this Court before, and affirmed for the matter of law in the Exchequer Chamber, and the judges likewise affirmed the same, that it had been so adjudged upon both points; but Noy. said, that there were two writs of error brought upon those judgments in the Exchequer Chamber, and that the justices were there agreed to reverse the judgments, because *scire facias* was sued against the first conusee *be being in by judgment*; and that the defendant in error perceiving the opinion of the justices against him compounded with the plaintiff, and so the judgment was not reversed.

Br. Assise, pl. 231. cites S. C.—Rec. gift. Brev. 147. cites 21 Ass.

2. Where a man is bound in a statute merchant to two, and the one purchases the land of the conusor before execution sued, it seems there that this is a discharge against both the conusees; the reason seems to be inasmuch as of a thing personal the one has power to discharge the whole. Br. Statute Merchant, pl. 23. cites 21 Ass. 23.

Noy. 47, 48. S. C. and that the purchase of part is no bar to have contribution against the conusor himself.—

3. If a conusor has two manors A. and B. and enters into two statutes, one to C. and another to D.—C. has execution of A.—C. after the statute entered into, purchased one acre of the manor of B. of the conusor: this does not determine his execution against the conusor. 2 And. 170. pl. 93. Trin. 42 Eliz. and agreed Hill. 43 Eliz. Deane v. Hynde.

—Cro. E. 797. pl. 43. Mich. 42 & 43 Eliz. C. B. S. C. but the point of the purchase does not appear.—Yelv. 12. Mich. 44 & 45 Eliz. B. R. S. C. but nothing mentioned of the purchase.

(M) What Act [shall be a Discharge] of all the Land.

[1.] IF the conusor of a statute *enfeoffs the conusee of the land*, this shall discharge the land; for though he does not enfeoff another, yet the feoffee shall hold discharged. 45 E. 3. 22.

* Br. Statute Merchant, pl. 25. cites S. C.

* 25 Ass. 7. 25 E. 3. 51.]

[2. But if the conusor purchases the said land again of the stranger, it may be extended; for all the land which he shall have before the extent is subject to the extent. 45 E. 3. 22.]

If a man makes a recognizance, and after infeoffs the recognizee, and he makes feoffment over, now the land is discharged; and if the cognizor repurchases the land it shall be put in execution, and yet it was once discharged; but strangers shall be discharged thereby, viz. His feoffees; per Townsend J. Br. Recognizance, pl. 9. cites 5 H. 7. 25.—And Brooke says, that this was taken to be clear law at the time of H. 8. and in the Court of Chancery in the time of E. 6. upon a statute staple; nota.—Br. N. C. pl. 441. cites S. C.—And see Ibid. pl. 293.

[3. So if conusor loses the land by action tried, and after this repurchases, it may be extended. 45 E. 3. 22. b. 25 Ass. 7. by Sharde. 25 E. 3. 51. b.]

[4. If

[4. If the *conusor enfeoffs the conusee* of the lands, and afterwards the *conusee re-enfeoffs the conusor*, the statute may be extended upon this land; for though it was *discharged by the purchase of the conusee*, yet by the repurchase of the conusor it becomes chargeable again; for the person is always chargeable, and as long as that is chargeable all the land which he shall purchase after the statute acknowledged is subject to it. * 25 Aff. 7. Adjudged. 25 E. 3. 51. 42. Adjudged.]

* Br. Statute Merchant, pl. 25. cites S. C.—S. P. Br. Statute Merchant, pl. 30. cites 5 H. 7. 25.—Ibid. pl. 9. cites

S. C.—S. P. Adjudged in error; for the person of the conusor and all his other land is charged, and therefore when he repurchased, this shall be charged. Brooke says, and so see that *it is not discharged any longer than the land is in seisin of the conusee*, but when the conusor repurchases it, it is charged again. Br. Statute Merchant, pl. 5. cites 4 E. 3. 22.

So if the conusor *repurchases parcel*, yet the conusee shall have the residue in execution. Br. Statute Merchant, pl. 25. cites 25 Aff. 7.

[5. If the *conusee releases all his right in the land*, this does not discharge the statute; for the land is not charged, but the body, and the land only chargeable in respect of the body. 45 E. 3. 22. b. Co. 10. Lampet. 47. b. 25 E. 3. 51. b. 27 E. 3. Execution 130.]

[551] See Release. (T) pl. 6. and the note there.—S. P. Br. Statute Mer-

chant, pl. 25. cites 25 Aff. 7.—Conusee may extend it after such release; per the Master of the Rolls. Mich. 1728. a Wms.'s Rep. 492. in the case of Brace v. the Duchess of Marlborough.

Yet against his own conveyance the conusee of a statute cannot in such case require contribution, which is the reason of the books that all other lands in the hands of other scoffees are by that occasion discharged, though such as are in the hands of the debtor himself are still chargeable. Hob. 46. pl. 50. in the case of Fleetwood v. Aston.

[6. But if *conusee makes a deed, that conusor shall hold the land discharged of the statute*, if the conusor *aliens the land, and repurchases*, yet it is not chargeable. 45 E. 3. 22. b.]

[7. So if *conusee releases all his right in the land, and all actions which he may have, because of the statute or the same land*, this discharges the land. 25 E. 3. 51. 25 Aff. 7. by Harring.]

In detinue of writing of a statute merchant, the defend-

ant prayed garnishment against A. who was bound by the statute, who came, and said that the statute was made to him, and to another who had released to him all actions. Belk. said, the plaintiff may have action of debt upon the statute if he will, by which Kniveton gave judgment that the plaintiff should be barred; for he cannot recover upon the statute contrary to the release. And so see release of all actions a good bar in a statute merchant; the reason seems to be inasmuch as the plaintiff might upon it have action of debt. Contra Littleton in his chapter of releases; for statute is only an execution. Br. Statute Merchant, pl. 47. cites 29 E. 3. 22.

Conusor enfeoffed H. of a manor. A. released to H. the tertenant of all right, title, interest, and demands which he had, hath, or ought to have in and to the manor aforesaid, &c. and all actions, suits, executions, and demands which he, his heirs, &c. then had, or might have out of or against the premises of the tertenant, &c. Adjudged that this release was a good bar of the execution upon the statute. Cro E. 40. Trin. 27 Eliz. C. B. Hyde v. Morley.

But this case of Hyde v. Morley being cited Cro. E. 552. pl. 2. Pasch. 39 Eliz. B. R. in the case of BARROW v. GRAY, the Court resolved that the release of all his right and demand in the land to the scoffee of the conusor is not any discharge of the recognizance; because at the time of the release made he had no right nor cause of demand in the land; for the land is not the debtor but the person, and the land is charged only in respect of the person; and at the time of the release, which was before the execution sued, he had not any right nor demand in the land: and Popham said he had conferred with the justices of C. B. concerning the judgment cited as in the case of Hyde v. Morley, and they did not remember any such judgment, but were of opinion that such a release was not any discharge of the execution.—Cro. J. 449. pl. 29. Mich. 15 Jac. B. R. in the case of Baskerville v. Bocket. Arg. says it was adjudged Mich. 26 & 27 Eliz. that such release to the scoffee of the conusor before execution was good; because he has not any means to have execution against the scoffee but by way of extent, whereas in the hands of the conusor the land was the debtor. [This seems to be the case of Hyde v. Morley mentioned above.]

By release of all demands by conusee of a statute merchant the conusee shall be barred of his action, because the duty is always in demand, yet if he * release all his right in the land it is no bar. Bridgm. 124. in the case of Mitton v. Bye, cites 25 Aff. 7.—Co. Litt. 265. says it has been so adjudged; for till execution he has no right in the land but only a possibility, and so may sue execution afterwards.—2 Mod. 108. Arg. S. P. in the case of Morris v. Philpot.

* Nor will it prevent his taking out execution after, but may be barred by a fine. Arg. Chan. Prec. 335. in the case of Goodrick v. Shotbolt.

Br. Statute Merchant, &c. pl. 42. S. P. cites 36 H. 8.—
 * Fol. 471.
 Br. N.C. pl. 293. cites S. C.—
 [8. If the conusee purchases parcel of the land, and afterwards conusor aliens the residue of his land to J. S. a stranger, J. S. shall hold his land purchased discharged; because he ought to have contribution against the conusee, and he cannot contribute to himself, and therefore by his purchase * all the land which shall come to the hands of the feoffees is discharged. Com. Pope and Roffe 72. b. + D. 2, 3. El. 193. 30. Adjudged 35 H. 6. Execution 21. Per Curiam.]

S. P. Arg. And. 266. pl. 266. pl. 263. in the case of Lynacre v. Rodes.—S. P. But if a man be seised of two acres of land, and is bound in a statute merchant, and after enfeoffs the obligee of the one acre, and retains the other, there he may sue execution of the other; for he may chuse to have execution of his goods, land, or body; for if the obligee purchases both the acres, yet he shall have execution of the goods. Br. Statute Merchant, pl. 48. cites 11 H. 7. 4.

In scire facias it was said, that where one is bound in a statute staple, and enfeoffs divers persons of divers parcels severally, and then enfeoffs the conusee of a parcel, and afterwards sues execution, the feoffees, or any of them, may shew, that feoffment is made to the conusee of parcel, and this will extinguish the statute against all; quod non negatur. Quod nota bene. Br. Statute Merchant, pl. 10. cites 7 H. 4. 31.

[552] D. 193. b. 194. a. pl. 30. &c. GASCOIGNE v. WHALLEY. Adjudged; but says that the next term Whalley sued a writ of error.

S. P. Per Moyle, which Dan. by denied. Br. Statute Merchant, pl. 35. cites 35 H. 6. and Fitzh. tit. Execution 21.—
 [9. If the conusor enfeoffs the father of the conusee of part of the land subject to the statute, and another man of another parcel, and the father dies, by which this land descends to the conusee, yet all the land is discharged. Dubitatur. 35 H. 6. Execution 21.]

S. P. Arg. And. 266. pl. 263. in the case of Lynacre v. Rodes.

[What Act shall be a Discharge of] Part of the Land.

S. P. That this is no discharge of the statute against the conusor himself, but the
 [10. If conusee purchases parcel of the land, yet this does not discharge the residue in the hands of the conusor; for his body and goods are always chargeable. 45 E. 3. 22. b. 25 Aff. 7. 25 E. 3. 51. Com. Pope and Roffe 72. b. 23 E. 3. Execution 127. Contra 22 E. 3. 16.]

feoffers of the conusor of other parcels shall be thereof discharged; per Bromley, Hales, and Portman J. and Rich, who was first Chancellor of England, and the apprentices of the court; quod nota, and the like in the time of H. 8. and E. 6. Br. Statute Merchant, pl. 42. cites 36 H. 8.—But if the conusee had the land delivered to him in execution, and purchases parcel of the land of the conusor, this is a discharge of the whole statute. Note the diversity between purchase after the statute, and before execution, and where it is purchased after execution had, and so is 45 E. 3. 22. Ibid.

But per Moyle, if the conusor upon a statute merchant enfeoffs the conusee of any part of his land, by this all the statute is discharged; quod tota Curia concellit. Br. Statute Merchant, pl. 35. cites 35 H. 6. and Fitzh. tit. Execution 21.

And

And per Ventris J. if the inheritance of part of the land extended comes to the conusee, it destroys the whole extent; for if it should not, the conusee would hold the residue of the land longer, because the profits that should satisfy the debt must be less, and this would be to the wrong of him in the reversion. 2 Vent. 327. in the case of Dighton v. Greenvil.

[11. If conusee releases part of the land liable to the statute by special words, making mention of the statute (as he may) and after conusor aliens the residue of the land, quære whether the alienee shall hold it charged, inasmuch as it was chargeable in the hands of the conusor after the release; but it seems the alienee shall hold it discharged, because it seems this is all one with the case where the conusee had purchased parcel, and after the conusor had aliened.]

12. Acquittance of part of the sum is no bar to the whole execution; quod nota. Br. Statute Merchant, pl. 12. cites 38 E. 3.

13. If the conusee disseises the conusor of part of the land of the conusor, the statute is thereby suspended. Agreed by the whole Court. Mar. 63. pl. 97. Mich. 15 Car. B. R. Leake v. Dawes.

Jo. 446. pl. 7. S. C. that disseisin suspends the execution till

the disseisin be purged; for if the conusee disseises the conusor of part of the land, he cannot sue execution against any scoffee of the conusor till the disseisin be purged.

14. Conusor of a statute conveys part of the land to J. S. and other part to W. R. and W. R. conveyed his part to the conusee by bargain and sale. The conusee extends the lands of J. S. who brought scire facias to avoid the statute, insisting, that by the purchase the statute was extinguished. But in alleging the bargain and sale it was not shewed to be by deed inrolled. A question arose, what estate the conusee had before entry, the deed not being inrolled, whether an estate at will by the common law or by the statute? As to which point the judges were not agreed. But it was agreed by the whole Court, that if he has but an estate at will the statute is suspended: and it was adjourned. Mar. 62. pl. 97. Mich. 15 Car. B. R. Leake v. Dawes.

Jo. 445. pl. 7. S. C. and that after mature deliberation, and the matter being twice debated, judgment was given for the plaintiff.

[553]

(N) What Act shall discharge all the Land, but [not any other] Part of the Thing to be extended.

[1. IF conusee purchases all the land yet the debt is not extinct; for the body and goods of the conusor are chargeable. 45 E. 3. 22. b. 25 Aff. 7. 25 E. 3. 51. b.] If the conusee purchases all the land, yet he shall have his body in execution; for the statute is, that he shall have the land in execution which was the conusor's the day of the recognizance, or after. Br. Statute Merchant, pl. 25. cites 25 Aff. 7. & 38 E. 3.

(O) Statute Merchant and Staple, Extender. In what Cases the Thing may be extended.

[1. IF the sum due by the statute does not exceed the value of the land, though the land be but of a small matter more valuable, * Fitzh. tit. Execution, pl. 254. cites S. C.]

lue, yet it shall be extended; for conusor may have it again. * 29 E. 3. 1. Adjudged 33 E. 3. Execution 161.

Fitzh. tit.
Execution,
pl. 254.
cites S. C.

[2. If the sum due by the statute merchant *exceeds the value* of the land of the conusor, yet it shall be extended, though the conusor never shall have it again; and so in effect he shall lose the fee. Dub. 29 E. 3. 1.]

Fitzh. tit.
Execution,
pl. 254.
cites S. C.

[3. If there are *diverse parcels* of land to be extended, *and of some parcels* of the land *the charges* upon the land *exceed the value*, but the value of all the land together exceeds the charges, all shall be extended; for there the conusor may have it again. 29 E. 3. 1.]

[4. If there are *diverse parcels* of land to be extended, *and some parcels* are charged so much *beyond the value of them* that the charges will exceed the value of those lands, *and of the other land also which has not any charge*, whether the land which has not any charge may be severed from the other land, and so be extended by itself, leaving the other land out of the extent, quære, inasmuch as *the statute is*, that all his land shall be delivered. Vide 29 E. 3. 1. tit. Execution 254.]

7 Rep. 37.
(38) Mich.
5 Jac. C. B.
S. C. ac-
cordingly,
by the name
of Lilling-

[5. If *lessee for life of a rent* acknowledges a statute and after *releases the rent to the tertenant*, yet the rent shall be extended; for it is in esse as to the conusor, being extinct by act of the party. Hill. 4 Ja. B. between Duncomb and Tillington. Per Curiam.]

Ron's case. — 4 Le. 235. pl. 370. Anon. and very short, but seems to be S. C. and says, it was held to be in esse as to the conusor. — 4 Le. 239. pl. 386. Duncomb's case, is only a short note, and mentions it only as the opinion of Coke Ch. J. that the rent should be put in execution.

[6. Upon a statute merchant, if upon a writ of execution the conusor be ** returned dead*, a writ of execution to extend the goods of the said conusor is not good; for he cannot have goods after his death. M. 5 Ja. B. Smith's case. Per Curiam.]

[554] [7. But in this case the goods are extendible by name of the goods which were the said conusor's. Dubitatur M. 5 Ja. B.]

Upon whom.

The case was, that Sadler came to the bar, and shewed, that 6 men had made a recognizance by statute merchant to one man, of which he had sued execution; and said, that the lands and chattels of a were severally delivered; and said farther, that a at another time had sued a writ out of this court to the sheriff, to deliver the chattels and the lands of the 4 who were parties to the recognizance, in discharge and aid of them 2, which writ the sheriff had returned, that the 4 are not found, and also none came of the part of the conusor to sue to take the land nor chattels of his livery; to the sheriff, the conusor, and the 4, are agreed to have our land till the debt be intirely levied, whereas the others ought as well to bear the charge as we: wherefore we pray a writ, that so much of their land be put in execution as belongs to their portion, so that it be delivered to us in aid of our charge. Grene said, this is not reasonable; and after he said, that they should have writ to warn the conusor to be here at a certain day to shew if he knew any thing to say why he ought not as well to take the suit against the others as against you; and then if he does not come, or has nothing to say, &c. he shall have execution of the other's lands, or you shall be discharged, having regard to the portion, &c. Hill. 29 E. 3. 7. a. b.

[8. If *diverse are bound* by a statute, if the land of any of them *solely* be extended, and not of all, this is not good, but he whose land is extended may avoid it. 29 E. 3. 7. b.]

[9. If

[9. If conusee of a statute merchant sues execution against conusor, and the sheriff returns, that he has extended the land, but does not return, that he has delivered it to the plaintiff, and thereupon comes one for the conusor, and says, that he is debtor to the king, and had writ out of the Chancery rehearsing, that he was debtor in the Exchequer; and prays, that execution cease till the debt of the king be levied. In this case the conusee shall not have execution for body or land till the debt of the king be levied. 41 E. 3. Execution 38. Adjudged. But process shall continue upon the roll till the debt be levied.]

(P) Extender of the Statute. *What Thing may See (Q) be extended.*

[1. **I**F there are goods and chattels to the value of the debt, the land shall not be extended. 45 E. 3. 22. b.] F. N. B. 131. (A) the note in

the margin, cites S. C. by Finch, that execution shall be sued first of the goods and then of the lands; but says 7 R. 2. Execution 46. The party has his election to take one or the other; and so is the use at this day.

[2. The goods and chattels can not be extended in the hands of a grantee. 30 E. 3. 23. b.]

[3. The land which was in the hands of the conusor of the statute staple [at the day of the recognizance made] or ever after, may be extended. 2 H. 4. 8. b.] Fitzh. tit. Execution, pl. 90. S. P. cites Trin.

24 E. 3. 27. Per Stouffe.

[4. If the reconusor has 2 manors, the conusee may sue execution in one only. 43 E. 3. 22. b.]

[5. So if conusor aliens a moiety of his land, conusee may extend [555] that which remains in his hands; for he shall not have contribution. 45 E. 3. 22. b. Co. 3. Sir William Harb. 12. b.]

[6. If land be extended, the river which runs upon the land is extended also. 2 H. 4. 8. b.] Per Hawkford; but Tirwhit

e contra. 2 H. 4. 8. b. — Br. Extent, &c. pl. 8. says, that by the best opinion upon a statute merchant, staple, or elegit, where writ issues to extend land, and a water runs through the land, this water does not pass by extent of the land; for the words of the writ are (of land) and therefore cannot extend water; by the best opinion 2 H. 7. in the written book.

[7. The office of filacer is not extendible. M. 10 Ja. B. R. Per Curiam.]

[8. Land in ancient demesne shall be extended upon a statute merchant. 2 E. 2. Execution 118. adjudged; for he shall have but a chattel. 7 H. 7. 10. b. admitted. Brook Ancient Demesne 37. Contra D. 22, 23. El. 373. 13. Contra 15 E. 3. Execution 62. 8 E. 2. Execution 136. in case of Elegit.] Mo. 211. pl. 351. that it was adjudged about 25 Eliz. B. R. that land

in ancient demesne is extendible upon statute staple, or statute merchant, in case of Martin v. Wilks. — And Ibid. that 11 Jac. C. B. Cox v. Barnesby, in trespass against the sheriff for extending lands in ancient demesne, it was held that they were extendible, and that the action did not lie.

[9. If

See (E. 11.)
the statute
of Acton
Burnel to-
wards the
end.

[9. If the *body be taken*, and he sues *audita querela*, and finds *mainprize*, and after makes default, the conusee may pray to have him in execution, or to have remedy against the mainpernors, but shall not have both. 50 E. 3. 12.]

[10. If *feoffor upon confidence*, before the statute of 27 H. 8. of *uses*, and after the 1 R. 3. had acknowledged a statute merchant or staple, this might be extended by force of the statute of 1 R. 3. For it is in effect a lease, and so within the equity of the statute. 7 H. 7. 6. b. Per Curiam.]

See (L) pl.
1.—Cro.
J. 424. pl.
9. Pasch. 15
Jac. & 477.
pl. 11.
Pasch. 16
Jac. B. R.

[11. If a man *seised of land leases it for years, reserving a rent*, and after acknowledges a statute, the *reversion and rent* may be extended upon this statute. P. 16 Ja. B. R. between Sir J. Harrington and Garroway. Adjudged by admittance; for the conusee, who had it in extent, recovered against the lessee in action of debt for the rent.]

S. C.——Palm. 272. Hill. 19 Jac. B. R. S. C.——If after the statute acknowledged, the conusor leases the land for years, the conusee may oust the lessee; for the words are into whose hands they come by feoffment, or in other manner. Kitch. of Courts 234. tit. Execution.——So of a *rent charge whereof the conusee is seised*, it shall be put in execution, and yet the statute de Mercatoribus, says only that the goods of the debtor, and all his lands, shall be delivered by reasonable extent, and says nothing of tenements or other things. And in this case the conusee after execution may avow for this rent without any attornment, he having his estate by the law. Mo. 32. pl. 104. Trin. 3 Eliz. Anon.——Dal. 34. pl. 27. Anon. S. P. and seems to be S. C.——D. 205. b. 206. a. pl. 7, 8, 9. Mich. 3 & 4 Eliz. GRAY v. SMART, S. C. and there it appears that the rent commenced upon a feoffment in fee made by the conusor *long before the recognizance*, and that at the time of the recognizance the conusor was seised of the rent in fee, and shewed that the conusor was seised of the land out of which the rent issued, without shewing how he came by it. So that the reporter makes a quære, because being extinguished, it cannot be seised and delivered; but perhaps if the execution of the rent charge was once had by the extent, then the interest of the conusee cannot be defeated by the purchase of the land made by the conusor; quære hoc, because Brown inclined that it might. But for several defaults in the pleadings the plaintiff had judgment to recover damages and costs, &c.——S. C. cited 7 Rep. 37, (38). b. in LILLINGSTON'S case, Mich. 5 Jac. in C. B. where the opinion was, that a rent extinct cannot be extended, &c. To which it was answered and resolved, that to some purposes by the common law, rent extinct shall be said in esse as to a stranger. And Ibid. 38, (39). b. says that the opinion of a serjeant obiter in that case of Dyer, was utterly denied.

If A. grants a rent to B. to commence 3 years after, and then B. is bound in a recognizance, and before execution B. grants the rent to J. S. and afterwards the rent commences, now the conusee cannot have this rent in execution; per Weston J. and some said that the conusor never had this rent in esse. Mo. 36. pl. 18. Trin. 4 Eliz. in an-anonymous case.

[556] [12. If a man *leases for life rendering rent*, and after acknowledges a recognizance, the *rent* may be extended upon this recognizance. 13 H. 4. Avowry 237.]

S. P. And the recognizee may distrain and make avowry for the rent; quod nota. Br. Statute Merchant, pl. 44. cites S. C.——A. seised of lands made a lease for life to B. and afterwards was bound in a recognizance, and then granted the reversion to J. S. B. attorned and died, and J. S. entered, and the conusee sued execution against J. S. The question was, whether the lands in the hands of J. S. were extendible? Dyer thought the execution well made, because a reversion is a tenement; for by the grant of all tenements a reversion passes, and so this was bound in the hands of the conusor. And it was said by some, that in this case the grantee had a reversion, and the possession is now come in lieu thereof. And Dyer held as before. Mo. 36. pl. 112. Trin. 4 Eliz. Anon.

[13. [So] if a man leases for life, *reserving for the 6 first years 3 quarters of corn by the year*, and after the 6 years, if he holds it over, *5l. a year*, and after acknowledges a statute within the first 6 years, the *rent* shall be extended as a *franktenement*, and not as a *chattel*. 15 E. 3. Execution 63.]

14. Upon

14. Upon a statute merchant, the sheriff *returned quod clericus est, &c.* and *prayed writ to the bishop ad deliber' bona ecclesiastica*, and could not have it; for this is not given by statute, but he had writ to the sheriff *ad deliberand' terr'*. And so it seems that the land of the *glebe* of a parson, may be delivered in execution. Br. Statute Merchant, pl. 38. cites 19 E. 3. and Fitzh. Execution 79.

15. It was said for law, that if the *conusor* upon statute staple *has a reversion, and grants it over, and after the tenant for life dies*, this land shall not be put in execution; for the reversion never was extendible in the hands of the conusor. Br. Statute Merchant, pl. 44. cites * 33 H. 8.

A. was tenant for life, remainder in tail to B.—B. acknowledged a statute, and

afterwards *granted his remainder to J. S.—A. died, J. S. entered.* The question was, whether execution shall be sued of this land upon the said statute, inasmuch that the said land was never in demesne in the hands of the conusor, and so not extendible in his hands. Lord Keeper Egerton said, that heretofore there had been a *difference* taken between a *remainder* and a *reversion* depending upon an *estate for life*; for to a remainder are no services due nor incident, and therefore it is termed *seck*: but a reversion has services incident, and those may be extended; and by consequence the reversion, when it comes in possession. But it seemed unto him that all was one; for one may charge a remainder, when it happens, as well as a reversion; and a statute is in the nature of a charge. Cook the Queen's attorney said there was no question in the case; for albeit there was some scruple made in 33 H. 8. b. 227. yet the case is without question; for if he in the remainder make a lease for years, to commence at a day to come, yet if he grant over his remainder, the grantee shall hold that charged with his lease, and every *statute is a charge executory*. By which the said lord keeper awarded that there should be a *liberate* made to the conusee upon the return above. Goldf. 120. pl. 5. Hill. 43 Eliz. Bull v. James.

* Br. N. C. pl. 227. S. C.

16. * *Copyhold lands* are not liable, nor shall be extended, nor *lease for life*; but *lease for years*, and all other *goods and chattels* of the conusor or debtor are liable, and shall be extended, *which the conusor has in his own possession and to his use, at the time of the execution sued or awarded*; but *goods demised, pawned, or pledged*, may not be taken in execution for his debt that demised or pledged them, during the time or term that they were demised or pledged. Greenw. of Courts 144, 145. Tit. Statute Merchant, cites 22 E. 4. fol. 10. 34 H. 8. Br. Pledg. 28.

* If tenant by the courtesy, or for life or years, be of a manor, and a copyhold comes into his hands by forfeiture or determina-

tion, and now he binds himself in a statute merchant or staple, and after demises this copyhold again, this *copyhold* shall be liable to the statute, because it was once annexed to the franktenement of the lord, and bound in his hands: but if a *copyholder bind himself* in a statute it shall not be extended; for he has only estate at will. Mo. 94. pl. 233. Pasch. 12 Eliz. Anon. says this diversity was agreed in C. B. as Hammond reported it.

17. Goods *distraigned for rent, amerciament, damage feasant, &c.* and which are impounded in *custodia legis*, during the time that they are so, may not be taken in execution. Greenw. of Courts 144, 145. tit. Statute Merchant, cites Br. Pledg. 28.

18. By the writ it appears, that the *sheriff may arrest the conusor* [557] *and extend and take his lands, goods and chattels*, and return the same extent in Chancery, &c. And thereupon *the conusee may sue a writ unto the sheriff out of Chancery, to deliver him the lands and goods to the value of the debt, which writ is called liberate.* F. N. B. 131. (C.)

19. A. *seised of the manor of D. after the life of a tenant in dower*, was bound in a statute merchant to B. and *sold the reversion to C. and his wife, and the heirs of C.* After which the *tenant in dower*

The husband seised in fee makes a jointure,

and then acknowledges a statute, and dies, living his wife, and leaves a daughter his heir; it was held, that a reversion cannot be extended. 2 Sid. 86. Tr. 1658. Street v. Roberts.

dower died. C. died. But B. in the life of C. assigned the statute to the queen. Process issued out of the Exchequer against the widow of C. to levy the debt: it was insisted, that she should not be charged, in as much as she never was seised of the land in possession. Shute thought her estate was paramount the charge as to the queen's title; for she had interest in the reversion before the assignment made to the queen: Manwood said, that it is a clear case, the reversion is subject to this statute, and when the reversion comes into possession the statute is extendible; and this was agreed to by the other barons. Sav. 34, 35. pl. 82. Mich. 24 & 25 Eliz. in the Exchequer, Paschall's case.

—The reporter adds, vide Br. Tit. Contra. — See (Q) pl. 1.

4 Le. 235. pl. 370. Mich. 5 Jac. C. B. Anon. S. P. and seems to be S. C. — Ibid. 239. pl. 386. DUNCOMB'S CASE, S. C. mentions it as the opinion of Coke Ch. J.

20. A. seised in fee of a rectory granted a rent-charge out of the same to J. S. who afterwards acknowledged a recognizance, in nature of a statute staple, according to the statute of 23 H. 8. to B. and then released this rent-charge to A. the grantor; upon a certiorari out of Chancery the recognizance was certified, and B. sued an extent on the rent-charge, and upon a liberate delivered to B. who brought debt against him in the remainder for the arrears, A. being dead, it was adjudged that the rent-charge was extendible, notwithstanding the release; for quoad the plaintiff, it is in esse, though in rei veritate the rent is extinguished. 7 Rep. 37. (38.) a. b. Mich. 5 Jac. C. B. LILLINGSTON'S case, alias Duncomb v. Lillingston.

That the rent after the release should be put in execution. It was observed that the statute of 23 H. 8. (by force of which the recognizance in the principal case was taken) refers for the execution of it to the statute staple, and the statute staple, viz. 27 E. 3. refers to the statute merchant, 13 E. 1. the words whereof are, "And when the lands of the debtor are delivered to the merchants, he shall have seisin of all the lands which were in the hands of the debtor the day of the recognizance acknowledged, into whose hands soever they afterwards come by scoffment, or otherwise." Then immediately upon the acknowledging the recognizance the rent was bound, and extendible in whatever hands it comes, and whether before or after execution is all one as to the release, which cannot hurt in either case: and by the statute de Mercatoribus, all the land (which includes all hereditaments extendible) which the debtor had at the time of the recognizance acknowledged, shall be delivered, and preserves the rent to be in esse, as to the execution of the conusee. 7 Rep. 37. (38.) b. 38. (39.) a. Lillingston's case.

21. The sheriff on extent upon a statute staple cannot *seise the land*, but only extend it, and the conusee shall have the profits, but he may seise the *goods*, otherwise the party may embezel them; but though he may seise the goods, yet the *property* remains in the party, and the sheriff nor the conusee cannot use them, till liberate in a nota by the reporter. Jo. 204. Hill. 4 Car. in case of Audley v. Halsey.

22. Lord Keeper was of opinion, that a *term for years* was not extendible by the conusee of a statute *in the hands of an executor*; and though it be extendible in the life-time of the conusor in his hands, yet the extent is but quousque, and if the *conusor aliens the term before extent*, the statute binds not the term; and then if it be not extendible in the hands of the executor, it is but a chattel, like a jewel or a horse, and there a judgment must be preferred in course of law to a statute. 1 Vern. 294. pl. 286. Hill. 1684. in case of Morgan v. Sherrard.

(Q) What

(Q) *What Things shall be bound by a Statute.*

[1. **I**F *tenant for life, the reversion in fee are, and he in reversion acknowledges a statute, and after grants the reversion, and then tenant for life dies.* This land shall be extended upon the statute; for it was bound by the statute. Tr. 39 El. in Chancery per Curiam and Cook, and the book of 33 H. 3. denied for law in Jon and Bull's case. Contra 33 H. 8. S. 227.] A reversion is affixed in the hands of the heir, and judgment may be given to have execution cum acciderit. D. 373. b. pl. 14. Mich. 22 & 23 Eliz. Anon.—Br. Statute Merchant, pl. 44. cites 13 H. 4. Contra.—Br. Execution, pl. 143. cites S. C.

[2. *So if tenant for life, the remainder in tail, the remainder in fee to a stranger are, and he in remainder in tail acknowledges a statute, and after grants his remainder to another, and then lessee for life dies, and after the tenant in tail, for the better assurance of it, levies a fine thereof to the grantee, and then the statute is forfeited: this land shall be extended upon the grantee; for it was bound in the hands of him in remainder.* Trin. 39 Eliz. in Chancery, adjudged per Curiam between Jon and Bull. Reported Tr. 39 El. B. R.] See (P) pl. 15.

(R) *Statute Merchant or Staple, Extender. How they shall be extended. By what Process. [And Proceedings thereon.]* See (E. 11.) pl. 5. S. 3.—See (K).

[1. **I**N a statute merchant, the first process after the certificate in Chancery is a *capias* to take his body, and no more, and this by the express words of the statute. 17 E. 3. 3. * 15 H. 7. 16. Hobart's Reports 173.] * Br. Statute Merchant, pl. 16. cites S. C.

[2. *And if upon this the sheriff returns cepi corpus, then he shall remain in prison by the space of a quarter of a year, in which time he may sell his goods and lands to pay the debt, and this by the express words of the statutes.* 15 H. 7. 16.] Br. Statute Merchant, pl. 16. cites S. C.

[3. *But if the sheriff returns non est inventus, execution shall be granted of his goods and lands.* * 15 H. 7. 16. 15 E. 3. Execution 59.] * Br. Statute Merchant, pl. 16: cites S. C.

[4. *In a statute staple and recognizance, in nature thereof, the first process is to take his body, lands and goods all in one writ; for this is by the express words of the statute, and more speedy than the statute merchant.* 15 H. 7. 16.] Br. Statute Merchant, pl. 16. cites S. C.—F.N.B. 130.

(F.) in the new notes there (a.) cites S. C.

[5. *If A. acknowledges a statute to B. and after acknowledges another statute to C. and C. first extends his statute, and after B. sues execution of his statute, and the sheriff returns the extent of C. B. shall not have the lands delivered to him without garnishment of C.* Because he is in by record of the Court. 22 E. 3. 8. adjudged

adjudged 9 E. 3. 24. But there said, that the *garnishment shall be by venire facias, and not scire facias*, and there the first execution * was by *elegit* for damages recovered. Co. 4. Fulwood 65. b. 2 R. 3. 8. b.]

S.P.F.N.B.
130. (F.) in
the new
notes there
(a) cites 15
H. 7. 14.—
* Fitzh. tit.

[6. When it is returned upon process upon a statute merchant, that the *conusor is dead, or non est inventus*, the process shall be to make execution of his lands and goods which he had at the time of the recognizance acknowledged, or after. Old Entries, Statute Merchant 595. * 9 E. 3. 24.]

Execution, pl. 97. cites S. C. and that the conusee had a writ to have the lands, and that the sheriff returned, that he could not have the lands, because J. S. had the lands in execution for damages recovered in assise against the conusor. It was insisted, that this return was not to be received, because the statute gives a general execution of all the lands into whose hands soever they came, and prayed a *scire facias*. But Scrope said, that the *scire facias* is given by statute out of the record; but that here is no record to warrant the writ, and therefore bid him take a *venire facias*; and so he did.

[7. The first process upon a statute *staple and recognizance* in nature of a statute staple, is to make *execution of his lands and chattels generally*; * without saying, his lands which he had at the time of the recognizance acknowledged. New Entries 12. 234. 236. Old Entries, Statute Merchant 595. Register 152. Fitzh. Na. 131. (D.)

* Fol. 474.

[8. But if the sheriff thereupon returns, that he had at the time of the recognizance, or after, in certain such lands or goods which he has extended or delivered, &c. and that he had not at the recognizance acknowledged, or after, any other lands or goods, &c. Old Entries, 598.]

[9. But when it is returned upon any of the recognizances that he is dead, the second writ shall be to extend his lands which he had at the time of the recognizance acknowledged, or after. New Entries 12. b. in recognizance, upon 23 H. 8. Old Entries 598. c.]

[10. Upon a statute staple and recognizance, in nature of it, the writ of execution, upon return of the death of the conusor, is to extend the land, &c. *nec non catalla quæ fuerunt the conusors at the time of his death*. New Entries 12. b. But see Old Entries 598. c. There is a writ to extend the land and goods of the conusor at the time of the debt acknowledged. But it seems the New Entries is better, and this is the constant course, and so has always been, as appears by the records of the extents which are in the Rolls. 21 June 8 Car. between Wigmore and the Executors of Michael Points, a new writ awarded, because the sheriff did not answer upon the first writ of what goods he was possessed at the time of his death.]

[11. Upon a statute merchant, if a *capias* be awarded out of the Chancery returnable in Bank, and the sheriff returns that *non est inventus*, a new writ shall be awarded to take him, &c. *Et quod si non fuerit inventus vel clericus sit, tunc bona, terras & tenementa, &c. Liberari faciat, &c.* Register Judicial 8. b.]

If a clerk
and a lay-
man are

[12. So in a writ of execution upon a statute *staple or recognizance*, in nature of it, if the sheriff returns that *non est inventus*, he

he ought also to return *whether he be laicus or not*; for this is the course, as appears by the writs of extent in the rolls.] jointly bound
&c. they
may be put
together in the same writ. Regist. Brev. 147.

[13. And in the said case, if he returns *that he is a clerk, he ought to extend his lay land, and goods, or to return that he has not any laicum feodum, nor goods nor chattels*; for this is the course. 1 Car. between Pope and Bawtrie so done.]

[14. But if he returns *quod clericus est beneficiatus nullum habens laicum feodum*, but *quod beneficiatus est* in such a diocese, then a writ of sequestration shall go to the bishop to sequester the profits and to deliver them to the conusee, *quousque* he be satisfied. 1 Car. between Pope and Bawtrie so done, as appears by the record of the extent in the rolls.]

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[15. Upon a statute merchant, the writ of execution for lands and goods is, *quod vicecomes omnia bona & catalla, terras & tenementa, &c. eidem the conusee sine dilatione liberari faceret per rationabile pretium & extentum, &c.* and is not commanded to do it *per sacramentum proborum & legalium hominum*. Old Entries 595, 596.]

[16. But upon such writ the sheriff returns an inquisition taken *per sacramentum proborum & legalium hominum*, by which he has extended the land, &c. Old Entries 596. b. but there 595. d. is no mention of the inquisition.]

[17. But the writ of execution upon a statute staple, and upon the 23 H. 8. is *quod vicecomes omnia terras & catalla per sacramentum proborum & legalium hominum de balliva sua per quos, &c. diligenter extendi & appreciari facerit, &c.* Old Entries 597, 598. Register 151. b. 152. New Entries 12. 234. 236. Fitzh. Na. 131. (D).]

[18. In the writs of execution for lands and goods upon a statute *merchant, after return of *non est inventus or mortuus*, there is such clause, *quod omnia terras & tenementa quæ fuerunt prædicti (the conusor) die debiti recogniti prædicto, vel unquam postea ad quorumcunque manus devenerint (nisi alicui hæredi infra ætatem existenti per descensum hæreditarium descenderunt) præfato the conusee liberari faceret*. Old Entries 595, 596. Register Judicial 8.]

* Fol. 475.

[19. So after a return of a mortuus in the writs of execution upon a statute staple, and upon recognizances in nature thereof after the said return that he is dead, there is the same clause (*nisi alicui hæredi infra ætatem existenti per descensum hæreditarium descenderunt*. Register judicial. New Entries 155. c. 12. And this is the common practice and form of the writs at this day in the rolls.]

T. C. seised in fee of the lands in question, June 14 Car. 1. acknowledged a statute staple of 2000l. to A.

and H. In Trin. 16 Car. 1. there was a judgment obtained against the said T. C. in this court of 200l. debt and damages, at the suit of W. L. T. C. dies, J. C. being his son and heir; the conusees sue an extent upon the statute, and in the writ (upon which depends this case) there are these words, *nisi alicui hæredi infra ætatem existenti jure hereditario descenderunt*; upon this writ the lands are extended, and upon that a liberate: this was in August 1651. In Anno Domini 1657. W. L. lessor of the plaintiff, upon his judgment which he obtained against T. C. takes out a sci. fa. against the tenants, and afterwards took out *elegit* against these lands of C. This J. C. when the extent upon the statute was taken out, was under age; but when the judgment and *elegit* was, he was

was of full age. J. C. by demand of the conusees of the statute enters upon the lessee of him that had the judgment, it appears J. C. consented to the extent upon the statute. He had no title of his own to enter upon W. L. but it was in their right. The question was, whether this extent upon the land by the conusees during J. C.'s minority, the writ being nisi alicui heredi intra ætatem existenti jure hereditario descenderunt, whether it be totally void, not only against the heir, though he did consent, but against all others; for if it were totally void, then W. L.'s judgment, though after the extent, was good; if so, it is for the plaintiff which claims under W. L. but if voidable and may be made good, then it is for the defendant. Bridgeman Ch. J. in delivering the resolution of the Court, said that though himself was of a contrary opinion, yet that he and his brothers are now of opinion that this extent upon the infant is totally void, viz. so void that any stranger may take advantage of it; and so gave judgment for the plaintiff. Cart. 18. Hill. 16 Car. 2. C. B. *Kite v. Clopton*.—See (H) pl. 9.

[20. The writ of execution upon a statute merchant for lands and goods is, *that vicecomes omnia terras & tenementa quæ fuerunt prædicti (the conusor, &c.) sine dilatione liberari faceret per rationabile pretium & extentum tenenda ut liberum tenementum, &c.* Old Entries 595, 596.]

[561] [21. But the writ of execution upon a statute staple, and upon recognizances in nature thereof, is, *quod vicecomes omnia terras & catalla (of the conusor, &c.) juxta verum valorem diligenter extendi & appretiari, & in manum nostrum seisiri faceret ut ea præfato (the conusor) quousque sibi de summa prædicta satisfactum fuerit liberari faciamus juxta formam ordinationis inde factæ; et qualiter, &c.* Old Entries 597. d. New Entries 12. 234. 236.]

S. P. And this by the words of the statute 27 E. 3. cap. 1. to which the statute 23 H. 8. has relation; in a note by the reporter. Jo. 204. Hill. 4 Car. in case of *Audley v. Halley*. [22. So by force of the writ upon the statute merchant, the sheriff may deliver the land and goods immediately upon the extent to the party; but by the writ upon the statute staple or recognizance in nature thereof, he is to extend the land and goods, and to seise them into the hands of the king, but not to deliver them to the party without a liberate.]

Kitchin. of Courts, tit. Execution 231. S. P. cites 2 R. 3. 9.— [23. The executor or administrator of the conusor of a statute merchant, staple, or recognizance, in nature thereof, shall have execution upon shewing of the recognizance, and testament without any scire facias. 17 E. 3. 31. 15 H. 7. 16. 2 R. 3. 8.]

Ibid. 232. cites 25 H. 7. 17. S. P. because it is given by the statute.—S. P. Br. Scire Facias, pl. 235. cites 2 R. 3. 8.—S. P. And this upon surmise, as it seems by Lib. Intrat. Br. Statute Merchant, pl. 37. cites 2 R. 3. 8.—Br. Statute Merchant, pl. 50, cites S. C.—S. P. And if the conusor be returned dead, yet execution shall proceed of his lands and tenements without scire facias against his heir, and the extent and liberate shall be sued immediately; but no remedy appears there for the goods of the conusor, when the conusor is dead, to have any execution of them. Ibid. pl. 43. cites Lib. Intrat. Placitorum.

And if a man sues such execution as executor, where he is not executor, or if the testator be alive, there the testator or the very executor shall have writ of disceit, and the conusor shall have audita querela or scire facias. Br. Statute Merchant, pl. 37. cites 2 R. 3. 8. Br. Statute Merchant, pl. 50. cites S. C.

S. P. But if the conusor dies his executors must sue a scire facias. Arg. Cart. 114. Mich. 18 Car. 2. C. B. in the case of *Law v. Toothil and Rawlins*. [24. If the conusor dies, yet execution may be granted against the executor, without any scire facias to have execution of his goods.]

[25. So execution lies against the heir and tenants without any scire facias.]

[26. So if the conusor be returned dead, yet execution shall be granted

granted against the executor without any scire facias, though it appears by the return of the sheriff, that the conusor is dead. Contra 15 H. 7. 16. b.]

[27. So upon return of the death of the conusor execution may be granted against the heir and tertenants of his land without any scire facias. 33 E. 3. Protection 115. Contra 2 R. 3. 8. b.] Kitch. of Courts 231, 232. tit. Execution, cites 2 R. 3. 9. That upon such return the conusor shall have a scire facias against the heir and tertenants.

28. One sued execution upon a statute merchant, and the sheriff returned, non est inventus; whereupon he said, that he had lands within the cinque-ports, and prayed a writ to the constable of the cinque-ports to deliver him those lands, and it was granted him. Fitzh. tit. Execution, pl. 70. cites Mich. 21 E. 3. 49. But Fitzherbert says, he thinks that he ought to have a writ to the sheriff first to have delivered those lands, though within the cinque-ports, and then to have a writ to the steward of the cinque-ports.

29. A man sues diverse certificates of one and the same statute merchant, and has a writ in C. B. and sues another writ and has certificate in * B. R. by which the conusor was taken where he had sued aud. quer. upon the first certificate, and therefore prayed to be by mainprize till they had pleaded in the aud. quer. But Seton said, they should not; because non constat that it was one and the same statute. And Mowbray said, it would be well to sue a writ to the mayor and clerk to certify if there were other statutes, &c. and so to aid himself: quære. Br. Mainprize, pl. 55. cites 29 Aff. 29. [*562] Br. Statute Merchant, pl. 26. cites S. C.—Greenw. of Courts 145. tit. Statute Merchant, cites S. C.—And because where a certificate

is sued in C. B. and the same plaintiff sues another in B. R. and the justices were certified by the mayor, that all was but one statute, the parties caused the record to come out of C. B. into B. R. and then a capias shall issue out against the conusor, and yet one conusor was taken before the common pless; but it appeared, that he afterwards escaped. Greenw. of Courts 145. tit. Statute Merchant, cites 29 Aff. 41.

30. Upon suggestion, that the lands were extended too high, and praying that the extenders shall have it by the statute of Acton Burnel, the Court awarded a fieri facias against the extenders. Br. Statute Merchant, pl. 1. cites 40 E. 3. 26. S. C. cited Br. Extent, pl. 2.

31. If a man sues execution in Chancery upon a statute staple, he shall shew the obligation to have the capias; but he shall not shew it to have execution of goods; per Littleton. Choke said, he thought not; for the writ remains in the Chancery, and once shewing is sufficient in one Court; for there the writ shall issue to take the body and seise the goods returnable in the same court; and at the day of the return he shall have liberate there: but upon statute merchant he shall have capias, and after writ to extend his land in all counties that he will, which capias is returnable before the justices of C. B. which is another court, and therefore there he shall shew the obligation again; quod Danby and Prisot concesserunt. Br. Statute Merchant, pl. 18. cites 37 H. 6. 6. Greenw. of Courts 146. tit. Statute Merchant, cites S. C.

32. The writ of execution upon a statute merchant may be returned as well into C. B. as B. R. F. N. B. 130. (G). But the writ of execution upon a statute staple shall be always returnable in Chancery and not in B. R. nor C. B. as the writ of execution

execution upon a statute merchant may. F. N. B. 131. (C)—S. P. Per Crooke J. Cro. C. 458. Pasch. 12 Car. B. R. in the case of Cleve v. Vere.

33. If a man be bound before the mayor of the staple, or in a statute merchant before another mayor, &c. and have *no lands but in Durham or other county palatine*, then upon the certificate of the statute made by the mayor, &c. upon the return of the sheriff, that he has not lands nor tenements within the bailiwick, the party may surmise, that he has not any thing but in the county palatine, &c. and pray that the tenor of the record may be sent thither to have execution done; and upon the surmise he shall have a writ. F. N. B. 132. (A).

34. Two inquisitions taken at several days by several juries upon one statute merchant were adjudged naught; one was taken of the land, and the other for land and goods: and extent of the whole 4th part was naught; for it should be of the moiety of the 4th part. And note, it was of a lease, which was but a chattel, and the sheriff might have sold it as goods; but seeing he had extended it, in this case he should receive benefit but as in a common extent. Brownl. 38. Hill. 10 Jac. Anon.

35. If the debt be not paid at the day, the proceedings upon it to have the fruits and effects thereof are not like to the proceedings in other cases or suits upon obligations, &c. to reduce them to judgment; but as they are in their own nature much like to the nature of a judgment, so is the proceeding and execution thereupon much like to the proceeding and execution upon a judgment; and therefore the conusee may bring an action of debt upon a statute, or he may as soon as the same is forfeited have a present execution of it. Greenw. of Courts 143. tit. Statute Merchant.

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36. If you would sue out a *recognizance taken in Chancery*, you are first to bring a copy of the recognizance to one of the clerks of the petty-bag, and thereupon he will make out 2 writs of *scire facias*; one of a return past, and the other of a return to come. These writs you must deliver to the sheriff of Middlesex, who will return them, as in this case the law enjoins him to do; and when you have your writs returned you are to carry them again to the petty-bag, and retain one of the clerks there to be your attorney herein, and then give the defendant a day to appear, which if he do not accordingly, a judgment is to be awarded against him for his said default; and if the defendant appears by the day to him so given, then is the plaintiff to declare against him by his said attorney, and the defendant is to answer and plead to the plaintiff here, as is usual in the courts of common law; and when you are at full *issue* you are at the furthest of your proceeding in Chancery; for then if you proceed to trial, you must have the whole proceeding in this office written into parchment; and it must either be sent by the officer of the petty-bag, sealed up, to be tried in B. R. or C. B. (which you will) or else it may be delivered over unsealed by the lord keeper or lord chancellor, which is agreeable with the words, *sc propria manu*, &c. For there

there can be no trial by jury in Chancery. Curs. Canc. 501. cap. 18.

37. The way of proceeding upon a *statute staple* is to go first to the *clerk of the staple*, and shew him the date of your statute staple, when it was acknowledged, which will appear by the statute itself; and then he will *make a certificate* thereupon, and seal it up; the which carry to the *clerk of the crown*, and give it him to *make the exigent* therein; and then deliver your certificate to the clerk of the crown, and have then your obligations made, and your *extent is to be made and indorsed* on the back side. This indorsement of the extent is called *the fine of the extent*, which must be delivered unto the *sheriff*, who will *impanel a jury to inquire and extend*, and apprehend as well the body as the lands, goods, and chattels of the party so bound; and when the *sheriff* has extended them *into the king's hands*, he will keep them *until* you bring him a *deliberate*, which you may have in the office of the petty-bag; but before you sue out the *deliberate* be sure to inform yourself whether there be estate or goods extended sufficient to satisfy your statute; for *after* you have taken your *deliberate* you *shall never have more than what was first extended and delivered*. Therefore if you can find any more lands or goods extendible in any other place than you have at first extended, you may get them extended likewise until you have sufficient to satisfy your debt; and when you have sufficient then deliver up your statute unto the clerk of the petty-bag, who will thereupon make your said writ of *deliberate*, and not before. Curs. Canc. 501, 502. tit. Statute Staple.

(S) Execution after Execution.

[1.] If the *land* of the conusor of a statute *merchant be extended* and delivered to the conusee, yet the conusee may have a *capias* to take his body also. Contra 20 E. 3. Execution 84] If conusee sue execution, and has the body of the conusor in execution this day, he may the next day sue execution of the lands and the next day after of the goods, and if the conusee discharges the body, the whole execution is discharged; per Windham. 2 Le. 96. pl. 117. in the case of Linacre v. Rhodes.

[2. If *six* are bound in a statute, and execution is sued against all, [564] and one is taken, yet afterwards another writ may be granted to take the bodies of the others, and by force thereof they may be taken, and put in execution. 26 H. 6. Execution 6.]

[3. If execution be sued upon a statute *staple*, and thereupon the *land and goods* are extended, and delivered to the conusee, yet the conusee may have a *capias* to take his body also.] It was agreed by all the justices, that within the years in the rate the conusee may have *capias* for the body; quod nota. But per Fairfax, he may have *capias* after the years; for though the years are past, yet non constat, that the conusee is satisfied. Br. Statute Merchant, pl. 16. cites 15 H. 7. 14.

[4. If execution be sued upon a statute, and the *land which the conusor has in right of his wife* is extended, and after, before the monies levied, the *feme* dies, the conusee shall have execution after against the body of the conusor; because as well the body as the land

Fol. 476.

Kitch. of Courts 232. Tit. Exe-

cution cites 15 H. 7. 14. S. P.—Upon certificate by the mayor of the staple into Chancery, a writ was awarded to the sheriff of S. to take the body of the conusor, and to seise his lands and tenements, and the sheriff returned as to the body, *non est inventus*, but that he had extended the land, which proved to be the land of the wife, who afterwards died, and the heir entered, and upon praying capias of the body, all the justices held, that he should have it, though he had not at the first, nor before the lands were divested; because the statute gives the land, goods and body, which varies from the executions at common law; for by Keble, where the conusee has the land and body also of the conusor, he will make the greater haste to satisfy the conusee, and it may happen, that the land may be divested as above, and then it is reasonable that the body should remain. Br. Statute Merchant, pl. 16. cites 15 H. 7. 14. Duplege v. Debenham.

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[5. So if after the land is extended, the conusee is expelled from the land by menace of life, &c. by the conusor, he may have execution against his body. 2 R. 3. 7. b. by all the justices.]

* See Statute 38 H. 8. cap. 5. at tit. Execution. [6. If upon a statute staple, the land be extended, and the land is evicted, yet after the years of the extent expired, he shall not have a capias to take his body without a surmise made of the cause, for which he would have it, in as much as it appears that years are expired, and so by presumption the debt levied. 15 H. 7. 15.]

* Br. Statute Merchant, pl. 16. cites S. C. accordingly. [7. If upon a statute staple, the land be extended and delivered, and non est inventus returned as to the body, and after, before the debt levied, the estate in the land is evicted, as by death of the feme of the conusor, whose land it was, yet he shall not have any other lands or tenements by a new extent. * 15 H. 7. 14. b. 7 H. 7. 12. b.]

* This is misprinted, and should have been 22 E. 3. 14. b. pl. 42. and there [8. If the sheriff extends parcel of the land of the conusor, and delivers it to the conusee in the name of all, and he accepts it, he shall not have any new execution for the remnant. 22 E. * 4. 14.]

[9. But otherwise had it been if he had refused to accept it. 22 E. 4. 14.]

Hill says, he ought to have refused the livery of parcel, and to have had another execution of the whole; but when he received parcel of the lands delivered to him by the sheriff, in the name of all the lands which were the conusor's, he received it as the writ purported, viz. As all his lands, and therefore now shall have nothing more, &c.——Fitzh. tit. Execution, pl. 86. accordingly, cites 22 E. 3. 14.——Fitzh. tit. Execution, pl. 134. cites S. C. accordingly.

And a man may well pray execution of the body in one county, and an elegit of the land in the other county. 10. The opinion was, that if a man sues execution of a statute merchant in divers counties, in each proportionably, viz. Twenty pound in one, and twenty pound in another county; yet upon nihil returned in one county, he shall have execution of the whole in the other, if he has assets there. Greenw. Courts 146. tit. Statute Merchant, cites 16 E. 3. Execution 49.

Greenw. of Courts 146, 147. tit. Statute Merchant, cites Execution 38.

[565] 11. A man was bound in a statute merchant in 101. *salvandum* anno 16 E. 3. and aliened the land, and execution was sued, supposing the day of payment to be anno 14 E. 3. and the alienee was by this ousted, and brought writ of error, and it lay well by award, notwithstanding he be a stranger to the record, because he is grieved, and

and no other, and was seised of the land at the time of the execution prosecuted. Pole said, now we never shall have execution again: but per Mowbray, yes, you shall; for the Chancery shall certify the tenor of the record, or otherwise we will award execution at another time upon this certificate, which now remains before us; and per Seton, if execution be sued, and made to the party, and the alienee brings assise, the other may justify though execution was never returned: but Pole Serjeant contra, and that it ought to be returned, with whom agreed Mowbray J. because the alienee is a stranger to the recognizance, contra of privies, by him. Br. Statute Merchant, pl. 21. cites 17 Aff. 24.

12. If execution be made, and not returned, the party shall never have another execution: per Pole. Br. Statute Merchant, pl. 21. cites 17 Aff. 24. *Otherwise it is then if he sues execution, and the sheriff*

does not return the execution, there he may sue another execution, contra if the execution be made, though it be not returned. Br. Statute Merchant, pl. 21. cites 17 Aff. 24.

13. If a statute merchant be *sued of parcel of the lands of the conusor, in the name of all his lands*, he shall never extend on the rest of the lands. Greenw. of Courts 147. tit. Statute Merchant, cites Mich. 22 E. 3. fol. 14.

14. If the *conusor or his heir, after execution sued, infeoffs the conusee or his assignee upon condition, and after re-enters for the condition broken*, yet the execution shall never revive again; for a thing which is determined cannot revive again. Br. Audita Querela, pl. 5. cites 46 E. 3. 20.

15. *Execution of a recognizance by elegit of lands, &c. of Thomas Camoys, was had by two merchants; and afterwards by a former statute, the same lands were out of the hands of the said merchants delivered to the former conusee, whereupon the two merchants desired to have execution of other lands of the said Thomas Camoys, and conceditur.* 2 Inst. 679.

16. If conusor upon statute staple be taken, and *escapes*, yet *his goods and lands may be extended upon the same statute; for the escape and the action which the plaintiff has against the sheriff for the escape is no satisfaction for the debt.* 5 Rep. 86. b. in BLUMFIELD'S CASE, cites it as adjudged, Hill. 33 Eliz. in C. B. Linacre v. Rodes. *Le. 230, 231. pl. 313. LINACRE'S CASE, S. C. accordingly. But if he goes at large by consent of*

the conusee, the whole execution is discharged, and the conusor shall have his land again immediately.—a Le. 96. pl. 117. S. C. that in case of execution upon statute merchant, the execution by the body is not a full execution, and therefore, though the sheriff has discharged the body, yet the conusee may have execution of goods and lands, but not of the body.—And. 266. pl. 273. S. C. accordingly.—S. P. Greenw. of Courts 145. tit. Statute Merchant.

17. So if the *conusor be taken, and dies in execution*, the conusee shall have execution of his goods and lands. 5 Rep. 86. b. in Blumfield's case, cites the case of Linacre v. Rodes. *a Le. 96. pl. 117. S. C. And there Anderson said, that*

if the conusor dies in execution, the conusee shall have execution against his heir of his land; for the having the body in execution is not any satisfaction to the party; for the body is but a pledge till the money is paid, and there is no reason that the act of the sheriff shall discharge the execution. And Windham to the same intent.—S. P. Greenw. of Courts 145. tit. Statute Merchant.

18. H. acknowledged a statute, and died; and upon an *extendi facias* the sheriff returned the *conusor* dead; a new *extendi facias* issued against the goods of the deceased; upon which the sheriff returned, that the * widow, who was *administratrix*, &c. had sold them; and thereupon another extent issued against the goods of the second husband. Moor 761. pl. 1056. Trin. 3 Jac. in Chancery. Heyward's case.

19. An extent upon a statute merchant issued out against Robson the *conusor*, and the sheriff returned, that the *conusor* was possessed of diverse goods, and seised of lands which he delivered to the *cognizor*, and that the *cognizor* accepted of the land; and because the sheriff did not return, that he had not any other lands, goods, or chattels, it was adjudged insufficient, and a new writ awarded; but many held, that in the case of *cognizor*, it was well enough, but not in the case of a purchaser. Brownl. 37. Fletcher v. Robson.

(S. 2) Interest. *What Interest the Conusor has in the Land after Extent.*

1. **A**N interest by extent is a new species of an estate introduced by statute law; our books say, that it is an estate created in imitation of a freehold, & *quasi a freehold*; but no book can be produced which says, that it is *quasi* an estate. The statute of 27 E. 3. cap. 9. enacts, that he to whom the debt is due shall have an estate of freehold in the lands: and the stat. of 13 E. 1. *de mercatoribus* says, that he shall have seisin of all the lands and tenements. When a statute is extended, it turns the estate of the *conusor* into a reversion; and so are the express words in Co. 1. Inst. 250. b. and so the objection, that he does not hold by fealty, is answered; and there are no tenures, that are to no purpose; but he that enters by virtue of a power to hold till satisfied an arrear of rent, leaves the whole estate in the owner of the land, and not a reversion only; per Ventris J. 2 Vent. 327. Dighton v. Greenville.

2. If a lease for years be made, reserving rent, and then the lessor acknowledges a statute, which is extended, the *conusor* after the extent shall have an action of debt for the rent, and distrain and avow for the rent, (as in Br. tit. Stat. Merch. 44. & Noy. fo. 74.) but he that enters by a power to hold for an arrear of rent shall not; per Ventris J. 2 Vent. 328. in the case of Dighton v. Greenville.

3. He in reversion may release to the tenant by extent, which will drown the interest and merge his estate according as it is limited in the release. Co. 1. Inst. 270. b. 273. Tenant by statute may forfeit by making a feoffment. Mo. 603. He is to attorn to the grant of the reversion, 1 Roll. 293. And is liable to a *quid juris clamat*, 7 H. 4. 19. b. Tenant by extent may surrender to him in reversion, 4 Co. 82. Corbet's case; and therefore

therefore these cases are to shew, that an extended interest makes an estate in the lands as much as any demise or lease; per Ventris J. 2 Vent. 328. in the case of Dighton v. Greenville.

4. The *conusee of a statute* extended the lands, and they were delivered to him upon a *liberate*. He assigned his interest, but the *conusor* still continued in possession. The question was, whether this interest was assignable? The Court held, that it was not assignable. It was objected, that before entry by the conusee this was like an *interesse termini*, or the interest of one that has a lease to commence at a future day, which is assignable; so here the conusee has an estate before entry: sed per Holt Ch. J. because by the return of the extent an interest was vested in the conusee, and by the return of the liberate it must * be intended, that he had the actual possession; for the sheriff returns, quod liberari feci, so that the estate of the conusee is turned into a right which may be granted, but it cannot be assigned; for the conusor continuing in possession makes a disseisin. 2 Salk, 563. Trin. 3 W. 3. Hammond v. Wood.

He should have brought an ejectment on the liberate and recovered the possession, and then the assignment had been good.

4 Mod. 48. Mich. 3 W. 3. B. R. Hannam v. Woodford, S. C. — Skin. 300. pl. 4. Mich. 3 W. & M.

B. R. Hannam v. Woodford, S. C. and held accordingly by Holt Ch. J. and Eyre J. — 3 Lev. 312. Trin. 3 W. & M. in B. R. accordingly, in the case of Stephens v. Hannam, — 3 P. cited Arg. Comb. 249. in the case of Smart v. Williams,

[567]*

(T) *Re-extent; for whom it shall be granted, [and when.]*

[1. **A** RE-EXTENT may be granted as well for the plaintiff as for the defendant, if they come at the day that the extent is returned. 22 Aff. 44. It seems it is in the discretion of the Court. 43 Aff. 18.]

Br. Extent, &c. pl. 5. cites 22 Aff. 44. — Br. Statute

Merchant, pl. 24. cites 22 Aff. 24.

[2. 20 E. 3. Fitzh. Extent 18. After the extent returned a re-extent was denied upon a surmise that the land was extended at ten marks where it was worth one hundred marks; but the reason there given is not good, that is to say, that he shall have account against him when he has received the money; for it seems he ought to levy the money according to the extent, and not according to the true value before the account lies.]

If the land be extended too low and delivered to the party, and he comes not in time to sue a re-extent, he is

without remedy unless he pays the money. Br. Extent, &c. pl. 5. cites 22 Aff. 44. — Br. Statute Merchant, pl. 24. cites 22 Aff. 44. — Fitzh. tit. Extent, pl. 12. cites 19 E. 3. accordingly.

In assise the tenant pleaded in bar, that he had the land extended upon a statute staple, and the conusor sued a re-extent, because the land was extended too low, and it was granted him; quod nota. Br. Extent, pl. 6. cites 43 Aff. 18. — But Brooke cites 15 H. 7. that at this day a man shall not have re-extent, nor other remedy, but shall pay the monies; but if extended too high, it may, at the prayer of the conusee, be delivered to the extenders by the statute of Aſton Burnell. Br. Extent, &c. pl. 6 — Ibid. pl. 9. cites S. C. and says, that neither plaintiff nor defendant upon a statute merchant or staple shall have re-extent. But the conusee, if the land be extended too high, may pray that it be delivered to the extenders by the statute of Aſton Burnell; and as to the conusor, if he mislikes, he ought to pay the money the sooner. — Br. Statute Merchant, pl. 16. cites 15 H. 7. 14. S. C.

3. Nota,

3. Nota, it appears by the preamble of the act of 32 H. 8. and by diverse books, that *after a full and perfect execution had by extent returned, and of record, there shall never be any re-extent upon any eviction; but if the extent be insufficient in law there may go out a new extent.* Co. Litt. 290. a.

4. The *conusor* and the *conusee* of a statute both *died*. The *executors* of the *conusee* *sued execution in Chancery*, upon which writ the *sheriff* returned the death of the *conusor*, and also an *inquisition* of the extent of the lands of the *conusor*; but in the *inquisition* no certain estate was *returned*, but *generally that the conusor was seised, at the day of the recognizance acknowledged, of the manor of Brodeley*, whereas the name of the manor was *Borley*, without shewing what estate; notwithstanding a *liberate* issued forth upon this return, and the *executors* *accepted of it* according to the extent. The doubt was, if the *executors* *die before any profits received* by them of the land upon that extent, *if their executors might have a re-extent* upon that insufficient and uncertain return? And it was the opinion of the justices, shewn the [568] Ld. Keeper, that they might, for the first extent was void; for the return, that he was seised, might be taken either of an estate for life or in tail; in which case, after the death of the *conusor*, his land is not extendible; and therefore of necessity, in this case, where the death of the *conusor* appears in the return it ought to be found, that he was seised of an estate in fee-simple only. D. 299. a. pl. 31. Pasch. 13 Eliz. Anon.

5. A statute staple was certified into the Chancery of the Exchequer, and *extendi facias* was awarded there, returnable in B. R. and the *extent* was *filed*. Afterwards it was discovered, that *several lands were omitted*, and therefore a re-extent was moved for: but it seems it cannot be, because the extent was *filed*. Sid. 356. pl. 8. Hill. 19 & 20 Car. 2. B. R. Anon.

See (E. 11)
pl. 5. S. 4.

(U) Re-extent; for *what Causes* it lies.

Mo. 873.
pl. 1216.
Comyn v.
Brandlyn,
S. C. ac-
cordingly;
but if at
the time of
the ap-

[1.] IF A. recovers debt or damages against B. and upon an *elegit* a term of B's is delivered to A. in satisfaction of the debt, though this is of more value, yet no re-extent shall be granted; for here it is not delivered as an extent of land, but as a *chattel* to the plaintiff in recompence of the debt. Hill. 11 Jac. B. between *Cummin* and *Brandlin*. Adjudged.]

praisement and before the delivery he had tendered the money en pais, or afterwards in Court, he should have an *audita querela*.—Brownl. 38, 39. S. C.

2. After an *elegit* sued upon a recognizance, and an extent and livery made, the *conusor* came and shewed an *acquittance of part of the debt*; and as to the residue, that the extent was not well made, and prayed a re-extent, and a writ to summon the *conusee* to answer to the deed: but it was not granted; for the suit is determined, and so he must take out an original, whereupon the matter

matter may be tried. Fitzh. tit. Extent, pl. 16. cites Hill. 13 E. 3.

3. *Extendi facias* upon a statute merchant *issued*, and the *sheriff* did not return the writ, and the party made thereof suggestion; and therefore prayed writ to the coroners, and could not have it, but only a re-extent. Br. Statute Merchant, pl. 34. cites 27 E. 3. & Fitzh. Suggestion 20.

4. If execution be defeated by lawful entry, the conusee shall not have a new extent. Kitch. of Courts 232. tit. Execution, cites 15 H. 7. 14.

5. It was said for law, that if a man sues execution upon a statute merchant or statute staple, and *part of the land is extended in the name of all the land*, which is returned accordingly, and the party accepts it, he shall never have extent or re-extent of the rest. Vide inde or de consimili lib. intrac. placitor. and that upon a *nihil returned upon a testatum est*, he may have process in another county: but otherwise it seems of such return of goods; for there the judgment shall be *quod habeat executionem de terris quosque summa levetur*. Br. Statute Merchant, pl. 40. cites 9 H. 8.

6. An extent was sued upon a statute merchant, and the sheriff put the conusee in possession of parcel of a house and lands, and let the conusor continue in the rest of the house. The conusee, in order to have full possession of the whole, caused the sheriff that he did not make a return of his writ; whereupon it was entered on the roll, *quod vicecomes nihil inde fecit nec misit breve*; and then an alias *extendi facias* issued to the new sheriff, who returned that a writ of extent came to the old sheriff, and that he extended the lands, wherefore he could not extend them upon the new writ. Manwood said that this certainly is an insufficient return, because it now appears on record that no execution was done; but if the entry had not been, he should well agree that the same is an execution for the party, though it be not returned. 2 Le. 12, 13. pl. 20. 20 Eliz. in C. B. Colshill v. Hastings. [569]

7. If a later extent be avoided by an elder extent, and afterwards the elder extent is satisfied, the later extent shall have the land according to his first extent, and this without any re-extent. See Brownl. 39. in case of Comyns v. Brandling.

(X) [Re-extent.] At what Time it shall be seen (T) prayed.

[1.] IF a statute be extended at too low a value, the defendant shall not have a re-extent, if he does not come at the day that the statute is returned. 22 Aff. 44.]

[2. So the plaintiff shall not have a re-extent, if the land be extended too high, if he does not come at the return of the extent. 22 Aff. 44.]

if he once agrees to the extent, he never shall refuse it after.—S. P. Regist. Brev. 146. in a note there, cites Hill. 43 E. 3.—If one will turn the extent on the extenders for very high price, he

Br. Statute Merchant, pl. 16. cites 15 H. 7. 14. S. P. For

he ought to say so at the first day of the return, or not at all. Mo. 753. pl. 1039. Per tot. Cur. Mich. 2 Jac. Anon.—Fitzh. tit. Extent, pl. 11. S. P. because he came in another term, and the sheriff had returned that he had taken the land, cites Hill. 44 E. 3. 2.

Fol. 477.

(Y) Statute Merchant, Staple, Recognizance.
Discharge of a Statute after Execution sued.

Br. Statute Merchant, pl. 15. cites S. C. accordingly.—S. P. Arg. 2 Le. 96. pl. 117. in case of Lynecre v. Rhode.—S. P. Pl. C. 78. b. in case of Rolfe v. Pope.

[1. **I**F the *body and land* are in execution upon a statute, and after the *conusee surrenders to the conusor all or part of the land extended*, this shall discharge the body of the conusor, and all the rest of the land; for his body is held in execution only till satisfaction, according to the extent; and by the surrender he acknowledges himself satisfied: for he cannot ever be otherwise satisfied out of the land. 15 E. 4. 5. b. and the land is become charged in fact by the extent.]

Br. Statute Merchant, pl. 15. cites S. C. as if land be extended at 20l. which may determine in twenty years, and the conusee does not take the profits in the twenty years, the party shall be discharged of the execution. Per Brian.

[2. [So] if the body and land are in execution upon a statute, and after the years incur according to the extent, though the conusee had not made any profit of the land, yet if he has no cause to hold it over the extent, the body shall be discharged also, as well as the land. 15 E. 4. 5. b.]

[570] So if it be a house which is afterwards burnt, the party shall be discharged. Br. Statute Merchant, pl. 15. cites S. C. Per Brian.

[3. But if the conusee has cause to hold over the term, there the body shall remain also in execution till satisfaction. 15 E. 4. 5. b.]

Br. Statute Merchant, pl. 15. cites S. C. that if the land be recovered, the body shall remain.—And if the recovery of the land be for waste done by the conusor, the body shall remain; but if it be for waste done by the conusee, the body shall be discharged. Ibid. Per Brian.

[4. So if all or part of the land extended be evicted, yet the body shall remain in execution till satisfaction. 15 E. 4. 5. b.]

[5. If A. and B. acknowledge a statute to C. and the bodies of A. and B. are taken in execution, and the land of B. extended and delivered, and after B. dies, and the land extended descends to C. the conusee, this shall discharge the statute against A. For his body ought to be delivered for this cause. 15 E. 4. 5. b.]

And if J. N. and my father are bound to me in a statute merchant, and I have their bodies in execution, and likewise two acres of land of my father's, and my father dies, by which means the land descends to me, in this case J. N. shall be discharged by this descent. Br. Statute Merchant, pl. 15. cites 15 E. 4. 5. Per Brian.

[6. If the body be taken, and the land extended and delivered upon a statute, and after part of the lands descends to the conusee, this shall discharge the body and all the land. Com. Rolfe 72. b.]

[7. So in the said case, if the conusor infeoffs the conusee of parcel of the land extended, this shall discharge the body and all the land; for by the execution the land is charged in fact, and become

become debtor, and now it cannot ever be satisfied out of the land; and so in law it is a satisfaction. Com. Rolfe 72. b.]

8. The conusee upon a statute merchant sued execution, and had it of the land, &c. a *defeasance* was made *after the execution*, that if he paid 20l. contained in the statute at a certain day, that he might enter. In assise brought by the conusee, the conusor, being tenant, pleaded this in bar, and that he paid and entered; and this was held a good bar. See Br. Assise 227. and Br. Dette, pl. 133. and Br. Defeasance, pl. 7. cites 20 Ass. 7.

Br. Statute Merchant, pl. 22. cites S. C.

9. If the conusee *purchases any parcel after execution* sued, this is a discharge of the whole statute; quod nota. And therefore it seems to be otherwise before execution sued. Br. Statute Merchant, pl. 5. cites 21 E. 3. Lib. Ass. 23.

10. *Assise against tenant by statute staple*, the plaintiff said, that after execution sued, the plaintiff repaid the money, and the defendant upon this rebailed the statute to him in lieu of acquittance, and after by covin retook it, and sued execution, judgment, &c. And per Cur. he is put to his audita querela, and shall not have it otherwise contrary to matter of record. Br. Statute Merchant, pl. 29. cites 43 Ass. 18.

11. If a man *has three in execution* upon a statute, and releases one, this is a discharge for all. Br. Statute Merchant, pl. 15. cites 15 E. 4. 5. Per Littleton.

S. P. Arg. 2 Le. 96. pl. 117. in the case of Lynacre v. Rhode.

12. A discharge of *parcel* seemed to Littleton to be a discharge of all, because the execution is intire. Br. Statute Merchant, pl. 15. cites 5 E. 4. 5.

13. When execution is had of the land, if he who has the execution, *releases the execution in one acre*, this shall discharge the execution in all, and of his body also. Arg. And. 266. pl. 263. in the case of Lynacre v. Rodes.

A release by the conusee after the extent, determines it to all in-

terests and purposes. Per Ventris J. 2 Vent. 336. in the case of Dighton v. Greenville.

(Z) Discharge of a Recognizance after Execution. [571]

[1.] IF the *bodies of divers conusors* are in execution upon such a recognizance, and the conusee comes into Court, and says that he releases, or that he will not have one of them in execution; if this matter be entered of record, all the others shall be discharged; for this conusance proves in itself a satisfaction. 15 E. 4, 5. b.]

[2. If the *body and land* be put in execution upon such recognizance, and after the land is recovered by a stranger in an action of waste, for waste done by the conusor, the body shall not be discharged, because the land is recovered, and so by consequence discharged, because the land is recovered, and so by consequence discharged by the act of the conusor himself. 15 E. 4, 5. b. Brooke Statute Merchant 15.]

[3. But otherwise it would be in the said case if the land was recovered for waste done by the conusee himself. Brooke Statute Merchant

Merchant 15. in abridging 15 E. 4. 5. Nota this may be if the conusor be a lessee for life.]

[4. If the body and land be in such execution upon such recognizance, and after the *conusor recovers in an action of waste against the conusee* (admitting that he may) *for waste done by the conusee*, yet it seems that the *body* shall not be discharged thereby; for the conusor recovered it by force of another statute, and damages for it, and this is not any satisfaction in law; but the *tert* of the conusee himself was the cause of the recovery.]

Pol. 478.

[5. If the body and land are in execution upon such recognizance, and after the *conusee makes feoffment in fee of the land*, which he has in execution, *and conusor enters for it*, yet it seems that the *body* shall not be discharged by it. See 15 E. 4. 6. Per Brian, that in such case the conusor may enter for a *forfeiture*, but says nothing whether the body shall be discharged thereby.]

[Z. 2] Restitution.

There are
divers pre-
cedents in the Chancery for *restitution* by writ, to be made after execution upon a statute staple.
3 Inst. 243.

[6. [1] See for this. Co. 3. Institutes 243.]

Anno 25 H. 6. execution was sued upon a statute staple, and for that *no certificate of the statute, &c. appeared of record*, the conusor had a writ of superseas out of the Chancery with restitution to be made; and the form of this writ appears in a register MS. in the Chancery. 3 Inst. 243.

In the case of Sir ROBERT GARDNER, in the time of Sir Thomas Bromley Lord Chancellor, *after a superseas granted*, execution was done upon a statute staple, whereupon a superseas was granted with restitution, reciting the special matter. 3 Inst. 243.

There is another precedent in 33 Eliz. in the case of one CARRANT, (but there the writ recited no special cause, but *pro diversis causis & considerationibus*), a superseas with restitution was awarded. 3 Inst. 243.

2. Upon a recognizance of one hundred marks, the conusee had elegit, and writ to extend and deliver the lands to the conusee till he had levied one hundred pounds. The sheriff returned the extent, and it was moved that the *recognizance* being only of *one hundred marks* and the *extent* being of *one hundred pounds*, the writ should abate, and the conusee be put to a new writ, and prayed restitution of the lands delivered on the extent. But Thorp said, that this *was only a misprison of the clerk*; for that *the roll is good*, and makes mention of this, so that he said they should have the land till the conusee had levied the one hundred marks, and then they should have restitution. Then it was ob-
[572] jected, that the writ issued without warrant, so that the conusee could not have execution upon it; sed non allocatur, but all was entered on the roll. Fitzh. tit. Execution, pl. 35. cites Pasch. 44 E. 3. 11. But says quære if he had levied one hundred pounds, what remedy?

(A. a) Statute Merchant, Staple, Recognizance.
The *Act of whom shall be good Cause to hold over.*
Act of God.

[1. IF land in extent upon a statute merchant, or staple, be *surrounded by water*, the tenant shall hold over his term till, &c. 11 H. 6, 7. Co. 4. Sir Andrew Corbet 82. b. Because this comes without negligence of the party, and by the act of God. * 15 H. 7. 14. b. 33 H. 8. Brook Statute Merchant 41.]

* Br. Statute Merchant, pl. 16. cites S. C. Per Keble. — Kitch. of Courts 232. tit. Execution, cites S. C. and cites 11 H. 6. 8. S. P.

[2. If parcel of the land extended be *burnt by wildfire*, he shall hold over his term until, &c. * 15 H. 7. 14. b. 33 H. 8. Brook Statute Merchant 41, where *by sudden tempest*.]

* Br. Statute Merchant, pl. 16. cites S. C. Per Keble. — Kitch. of Courts 232. tit. Execution, cites S. C. accordingly. — 4 Rep. 82. b. Mich. 41 & 42 Eliz. in the Court of Wards, in Sir Andrew Corbet's case. S. P. cites the same cases.

[3. So if the *profits* of the land extended are *wasted by any act of God*, without default or negligence in the *conusee*, he shall hold over till, &c. Co. 4. Sir Andrew Corbet 82. b.]

III. If I have execution by statute merchant, and before the term ended the *tenant of the franktenement dies*, his *heir within age*, and the *lord seises the ward of the land*; after the full age of the heir I may enter again till I have levied the money, notwithstanding the term is past. Per Chant. Mich. 11 H. 4. 7. 2. pl. 11.

Act in Law.

[4. If he in *reversion recovers in audita querela* against tenant by statute merchant, who *reverses it by attain*, he shall hold over his term until, &c. because he was disturbed by the *audita querela*, (which is an act in law.) 11 H. 6, 7.]

So if the wife of the *conusee* recovers dower against the tenant by execution, he shall hold over. Co. Litt. 289. b.

Act of a Stranger.

[5. If a stranger *enters upon the tenant* by statute, and *ousts him*, yet he shall not hold over his term but must have his remedy against the stranger. Sir Andrew Corbet 82. b.]

S. C. cited in a note by the Reporter. 2 Saund. 72.

Hill. 21 & 22 Car. 2. B. R. in case of Underhill v. Devereux. — But if a man *pays out his lease* for years, or *disseises his lessee* for life, and *after acknowledges a fault*, and *execution is sued* against him, and the *lessee re-enters*, the tenant by execution after the lease ended shall hold over. Co. Litt. 289. b.

So if land be extended, and the *conusee is ousted by a guardian in knight service*, he shall hold over. Kitch. of Courts 232. tit. Execution, cites 15 E. 4. 5.

(B. a) The

(B. a) The Act of the *Party*. *Who shall have Benefit* thereby.

[1. **I**f he who has the *reversion ousts the tenant* by statute merchant or staple, he may hold over his term until, &c. For he shall not have benefit by his own tort. 11 H. 6, 7. Co. 4. Sir Andrew Corbet 82. b. 15 H. 7. 14. b. 15. b. It is at the election of the tenant by statute *either to hold it over, or to have his action for the profits.* 7 H. 7. 12. b.]

*S. P. And so if the heir of the conusee interrupts the tenant by statute merchant, he shall hold over; per Bridgman

2. Tenant by statute merchant, or staple, may hold over their term; for the judgment is, that he shall have the land according to the rate and extent, until he be satisfied, and mentions nothing of any years certain. And there may be several cases where such tenant may hold over his term of the extent; as if the * *conusee* interrupts him to take the profits, &c. where it is no folly in the conusee, there he shall hold over his extent, if he be not satisfied before. Br. Statute Merchant, pl. 16. cites 15 H. 7. 14.

Ch. J. in delivering the opinion of the Court. Cart. 77. Trin. 18 Car. 2. C. B. in case of Thomason v. Mackworth.

(C. a) The Act of the *Party himself*.

But if the conusee himself takes the profits from the conusee,

[1. **I**f the tenant by statute *does not levy the money by his neglect; so that the term expires* by effluxion of time, he shall not hold over. Co. 4. Full. 67.]

the conusee may hold over his term. Kitch. of Courts 232. tit. Execution, cites 15 H. 7. 14.

[2. If the tenant by statute merchant, *by his ill husbandry*, does not levy the money within the term, he shall not hold over; for it is his own default. 11 H. 6, 7.]

Fol. 479.

* This is misprinted for Sir Andrew Corbet's case.—

[3. If the *tenant* by statute merchant, or staple, *surrenders his estate to him in reversion upon condition, and enters for the condition broken after the term expired*, he shall not hold over; for the surrender was his own act, and he cannot by his own act enlarge his interest. Co. 4. * Full. 82. b. 33 H. 8. Statute Merchant, Brook 41.]

As if land of 10l. per annum is delivered in execution for 40l. this may incur in four years, and there the conusee by such condition cannot enter after the four years incurred; for he ought to take the profits upon his extent immediately; for he shall not hold over his term unless in special case, as where the *land is surrounded with water, sudden tempest, or the like*; and the judgment shall be *quod teneat terram ut liberum tenementum suum quousque denarii levantur; quod dicitur pro lege.* Br. Statute Merchant, pl. 41. cites 33 H. 8.

* Misprinted, and should be Sir Andrew Corbet's case.

[4. So it seems, if he *enters within the term* by effluxion of time for the condition broken, yet he shall hold over his term. Co. 4. * Full. 82. b. put generally.]

[5. If

[5. If a man has *execution of a house which will continue in extent by effluxion of time, by 20s. and where in the term the house is burnt* (it seems it is intended by a *casual fire, and not by wild-fire*); so that he cannot have contentation within the term, yet he shall not hold it over the term. 15 E. 4, 5. b.]

Br. Statute Merchant, pl. 15. cites 15 E. 4, 5.—
* 20 years it should be.

[6. If the tenant by statute *makes feoffment in fee of part of the land in extent, and the conusor enters into the land for it, as he may, the tenant by statute shall not hold the residue of the land extended over his term, because he has lost the other land by his own act.* See 15 E. 4, 5. it seems will prove this, per Brian.]

[7. If the *land of a lessee for life for years be extended upon a statute, and after part of the land is recovered in an action of waste for waste done by the conusor before the extent, it seems that the conusee shall hold the residue over his term, till satisfaction of the sum arrear.* See 15 E. 4, 5. b. Brook, Statute Merchant 15.]

[8. *But in the said case, if the recovery in the action of waste was for waste done by the tenant by statute after the extent, it seems he shall not hold the residue in such case over his term till satisfaction, because it comes by the action of the tenant by statute himself.* 15 E. 4, 5. b. Brook, Statute Merchant 15.]

[9. *But in the said case, if the recovery in the action of waste be for waste done by the conusor after the extent, there he shall hold the residue over his term till satisfaction; for this is the act of the conusor himself.* See 15 E. 4, 5. Brook, Statute Merchant 15.]

10. If statute staple be *extended, and so remains by seven years without deliberate made, yet he may have a deliberate at the end of the seven years.* Br. Statute Merchant, pl. 41. cites 33 H. 8.

11. *The reason of holding over by tenant by statute merchant, tenant by elegit, &c. is, that there is no term certain, but only till such a sum be levied by them; and therefore it is consistent with such an interest, that in some case such tenant may hold over.* 4 Rep. 83. a. in Sir Andrew Corbet's case.

(D. a) Statute Merchant, Staple, Re-entry. In what Cases Conusor may re-enter.

[1. IF the *conusor tenders the money to the conusee for which his land is extended, and the conusee refuses the money, yet the conusor cannot re-enter.* Contra 22 Aff. 44]

Br. Statute Merchant, pl. 24. cites 22 Aff. 44. Per Bank J.

that he may enter upon him, or have audita querela. But Brook makes a quære of the entry.

[2. If the *extent with all costs and damages is satisfied by casual profit, yet the conusor cannot enter, but must sue a scire facias.* 15 H. 7. 15. b. inasmuch as the conusee is in the land by matter of record, and shall not be disturbed by entry before answer in court of record.]

If a manor or other seignory be extended on a statute, and a ward falls of sufficient value to satisfy the extent, yet it shall be no satisfaction in tender to satisfaction; for it is only a fruit of the tenure, and not like cutting of trees, or digging coal, or other ore; and Coke Ch. J. said, it was so adjudged. 2 Brownl. 122. Brandon's case, cites 21 E. 3. 1.

only a fruit of the tenure, and not like cutting of trees, or digging coal, or other ore; and Coke Ch. J. said, it was so adjudged. 2 Brownl. 122. Brandon's case, cites 21 E. 3. 1.

Br. Statute
Merchant,
pl. 16 cites
S. C. & P.

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Fol. 480.

■ Infl. 680.
cites S. C.

[3. If the *extent expires by effluxion of time*, according to the extent, yet the conusor cannot re-enter, but ought to sue a *scire facias*; because it may be that the conusee has cause to retain the land over the years of the extent, and he shall retain also till he be satisfied of his *costs and damages, with his reasonable labours and expences*. * 15 H. 7. 15. b. Dubitatur. Co. 4. Fulwood 67. b. Resolved, and that the *Lord Chancellor shall assess the costs and damages*. Contra 32 E. 3. Scire Facias 101.]

[4. Upon an *extent by elegit*, the owner of the reversion, after the extent is expired by effluxion of time, may re-enter *without suing of any scire facias*; because such tenant by elegit *shall not have costs and damages*, nor other thing, but only the land till the debt satisfied. Co. 4. Fulwood 67. b.]

5. If the *conusee aliens in fee*, the conusor may enter, and if the other brings assise, he may plead this statute in fact. Br. Statute Merchant, pl. 15. cites 15 E. 4, 5. Per Brian.

6. Conusor cannot enter *during the terms* in extent, but shall have a *scire facias*. Kitch. of Courts 232. tit. Execution, cites 15 H. 7. 14.

Statute Merchant, Staple, Recognizance. In what Cases he may avoid it by pleading without Scire Facias.

*See Audita
Querela.

(E. a) In what Cases it may be *avoided by Plea without Scire Facias, or Venire Facias, or * Audita Querela*.

[1. UPON a certificate in Chancery of a statute merchant, the conusee has a *writ to take the body, and the sheriff does not make execution*: but at the return of the writ, the conusor may come, and *shew the acquittance of the conusee of the debt in bar of the execution*, and the conusee shall be put to answer it, though properly the parties have no day in Court. 17 E. 3. 3.]

2. So, in the said case, the conusor may at the return of the writ *shew an indenture of defeasance*, by which it was granted, that upon payment of a certain sum the statute should be void, and aver the payment thereof; for *before execution made*, he may plead it without audita querela. Otherwise it had been if execution had been made. 17 E. 3. 3.]

3. *Execution was sued in C. B. upon statute merchant, and audita querela thereupon*, by which the plaintiff sued another execution thereof in B. R. wherefore they shall send to C. B. to certify the record, and so they did; and upon this they held plea thereof in B. R. as upon error brought there, and the parties shall proceed there. Br. Jurisdiction, pl. 107. cites 29 Aff. 4.

4. A man sued execution upon a statute staple, and the defendant sued *scire facias* against him upon *defeasance by indenture*,
and

and the conusee was compelled to answer to it without audita querela; quod nota. Br. Scire Facias, pl. 62. cites 7 H. 4. 31.

5. If *habeas corpus* be returned, that the party is imprisoned by execution upon statute merchant, and the defendant pleads a release of the conusee, the Court cannot hold plea thereof upon the release without audita querela; per Cur. notwithstanding that the writ of execution be returned here, by which he sued audita querela. Br. Jurisdiction, pl. 44. cites 22 H. 6. 46.

6. Where the conusee is satisfied within the time by casual profit, [576] the conusor shall have a venire facias with a surmise thereof, and thereupon a scire facias. Br. Statute Merchant, pl. 16. cites 15 H. 7. 14.

7. Ejectione firmæ. It was found by special verdict, that the Ld. Mountjoy being seised in right of his wife, was bound in a statute of 2000l. in 6 Eliz. to L. D. and after let the land to H. for 21 years, and after let the land to J. C. for 99 years to commence immediately, and 12 Eliz. the land was extended upon the statute at 53l. per ann. The Lord Mountjoy and his wife grant the land to Perry in fee, and during the extent J. C. grants the term to his son. The Ld. Mountjoy died; the son enters upon the conusee of the statute, &c. Quære if the lessee may enter upon the conusee of the statute without a scire facias. Adjournatur. Cro. E. 152. pl. 31. Mich. 31 & 32 Eliz. B. R. Cadee v. Oliver.

3 Le. 153. pl. 205. S.C. states it, that the Ld. Mountjoy and his wife (jointly) made both the said leases; that the Lady Mountjoy died. One question was, if the son of C.

might enter upon the conusee of the statute after his extent expired, without suing a scire facias? But the Court discharged the arguing that point by the counsel; because by the death of the Lady Mountjoy, the extent was void, and therefore might be avoided by entry.

(F. a) Scire Facias or Venire Facias, or Pleader. For what Causes it shall be granted.

[1. IF he who makes a statute merchant be taken in execution, and sets forth the acquittance of the conusee, yet he shall not have a venire facias thereupon, but shall be put to his audita querela. 47 E. 3. * Execution 40. Adjudged.]

* Fitzh. tit. Execution, pl. 40. cites M. 45 E. 3. 24.

[2. If execution be sued upon a statute merchant of the body and land, and before the return thereof, the conusor purchases an audita querela, though the statute be not returned, by which the Court may be informed whether there be such suit or not, yet for the mischief, that the conusor may be taken in the mean time, and his land delivered, a venire facias may be granted with a clause of supersedeas. 17 E. 3. b. Adjudged.]

Writ of execution with extendi facias issued upon a statute merchant, the writ was not returned, and

the conusor surmised that the execution is incurred, and prayed venire facias upon audita querela, and could not have it notwithstanding the non-return; quod nota; and yet the writ ought to have been returned, and the land upon it delivered to the conusee by liberate thereof, as it is said. the time of H. 8. Br. Statute Merchant, pl. 32. cites 39 E. 3. 30.

3. If a man be severally obliged in two statutes to two men, and execution is first sued upon the second statute, there the conusee shall have

have scire facias against him, because he is in by law. Br. Scire Facias, pl. 235. cites 2 R. 3. 8.

(G. a) Scire Facias *ad Re Habendum*, or Audita Querela. *In what Cases.*

[1. **A**FTER an execution sued upon a statute merchant, no scire facias to re-have the land, lies upon *shewing of a defeasance* of the statute, and *surmise of the performance* of it; but he is put to his audita querela; because this disaffirms execution to have been ever good. 33 E. 3. Execution 161. Admitted.]

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[2. If a conusor sues an *audita querela* upon a *defeasance* of a statute merchant, and alleges that he has paid the money according to the defeasance, and after the plaintiff is nonsuited, by which his body is awarded to prison; the plaintiff shall afterwards have a *sci. fac.* upon *shewing of his acquittance*, and shall not be put to an *audita querela* out of Chancery; because the judgment was given upon the nonsuit in B. that his body should remain for the debt; for this is grounded upon the records of this Court. 33 E. 3. 161. title Execution. Adjudged.]

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[3. After execution upon a statute merchant against the *tertenants* a *scire facias* does not lie against the *conusee*, and the other *tertenants*, upon a *surmise* that the other *tertenants* have land liable to the extent, which is not extended, but is put to his *audita querela*; for this disaffirms the execution. 33 E. 3. Audita Querela 38. And there *diversity* taken between a *re ognizance* in the same court, and where it is upon a statute out of the Chancery.]

* Br. Statute Merchant, pl. 26. cites S. C.

[4. After execution upon a statute merchant, no *scire facias* to re-have the land lies upon a *surmise* that the money was paid before the execution sued, and *shewing acquittance* thereof; but he is put to his *audita querela* out of the Chancery, where the execution is awarded returnable in Bank, or King's Bench, so the original thereof is in the Chancery. Tit. Scire Facias 9. in Abridging 18 E. 3. where that *diversity* is taken, where the execution is upon *recognizance* in the same court, and where it comes out of Chancery. * 28 Aff. 7. accordingly; for this *surmise* disproves the first execution, and does not stand with it.]

* Br. Statute Merchant, pl. 29. cites S. C.

[5. [So] after an execution upon a statute merchant no *scire facias* lies upon a *surmise* that before execution the conusor paid the money, or made agreement with the *conusee*, and [who] delivered the statute to him in lieu of acquittance, and after got the statute and sued execution, but is put to his *audita querela*, because the original suit is in Chancery. * 43 Aff. 18. 43 E. 3. 23. 1 H. 7. 14. 15 E. 4. 6.]

Conusor shall not have a *scire facias* before the term ended without shewing

[6. But after execution upon a statute merchant a *scire facias* lies to re-have the land upon a *surmise* that he has paid after the extent all the money, *shewing his acquittance*, or part, *shewing the acquittance*, and brings the residue into court, or that the residue is paid by casual profit, without suing an *audita querela*, because this affirms

affirms the execution to be good, and that it is satisfied after by *acquittance*,
matter ensuing. 50 E. 3. 16. 21 E. 3. 1. adjudged. 38 E. 3. 12. or that he
b. Brook, Scire Facias 87.] *leave the*
money in

court. Kitch. of Courts 232. tit. Execution, cites 15 H. 7. 14.

[7. [So] after an execution upon a statute merchant, it seems a scire facias to re-have the land; lies upon a surmise *that part was paid before the extent, shewing the acquittance of the party, and that the residue is levied according to the extent afterwards*, and he is not put to his audita querela; for this affirms the execution to be good, though the extent be for all the sum acknowledged. See for this 38 E. 3. 12. Brook, Scire Facias 87. But it is not clear there whether part was paid before the extent or after, but *was received by the conusee before the assignment of his estate*. Therefore quære this.]

[8. Upon a statute *staple or recognizance* in nature thereof, if the land of the conusor be extended, upon *surmise of payment after the extent, and shewing of acquittance, or upon paying of the monies arrear in the court of Chancery*, a scire facias ad re habendum terram lies in Chancery, without any audita querela; because the recognizance and execution is in the *same court*, and this is pursuant to the execution, and in affirmance of it. † 15 H. 7. 15.]

The conusor shall not have scire facias before the years are expired, unless upon acquittance, or bringing the money

into court; but after the years expired he may; because in the last case it shall be intended that the party is satisfied, but it shall not be so intended within the years without special matter declared. Br. Stat. Merchant, pl. 16. cites 15 H. 7. 14.

† I do not find it there.

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[9. So, a scire facias lies upon a statute staple or recognizance in nature thereof *upon a shewing of a defeasance, and alleging of the performance of the conditions*, and this without being put to an audita querela, though it disaffirms the execution, because the recognizance and original suit is in the same court. 7 H. 4. 31. it also appears by the statute of 11 H. 7. cap. 10. *that the conusor being brought into court by habeas corpus has used to have a scire facias thereupon*.]

[9. So, a scire facias lies upon a statute staple or recognizance in nature thereof upon a *surmise of payment before the execution sued, and shewing of acquittance* thereof, without being put to an * audita querela, though this disaffirms the execution ab initio; because the recognizance and the original suit is in the same court, and it is grounded upon a deed. Register 150. Such writ of scire facias upon a recognizance in Chancery.]

* Fol. 482.

* [11] [But scire facias does not lie upon the said recognizances upon a *surmise of any thing, which extinguishes the recognizance by a matter in fact before the execution sued, as upon allegation of purchase of parcel of the land, and such like, though the body be taken in execution*, but he is there put to an audita querela; because it is grounded upon a matter in fact. Com. Rolfe 72. Audita querela there brought.]

* This in Roll is misprinted, pl. 9. and the following pleas in like manner.

[12.] [After execution upon a statute merchant, if the body of the conusor be taken in execution as well as the land extended, a scire facias lies upon a *surmise of a thing which ensued after the extent*,

Br. Scire Facias, pl. 15. cites S. C.—Br. Sta-

tute Merchant, pl. 15. cites S. C. accordingly, by reason of the long delay in bringing an audita querela, wherein the process is distringas, alias, and plurics, and so in infinitum; and it is not reasonable to permit such delay when the party is in prison. And afterwards a new scire facias was returned the same term. Nota.

extent, which extinguishes the extent, as, that he had surrendered all or part of the land extended to the conusee, or such like, without any audita querela, because the body is in execution, and this writ is more speedy than the audita querela, the process in the audita querela being only a distress infinite. 15 E. 4. 5.]

[13] *[But in the said case a scire facias would not lie, but he should be put to an audita querela, if his body had not been taken in execution, but only the land extended; for there would be no such mischief from the detaining of the body in prison; for this is grounded upon a naked surmise, without any writing or record to warrant it. 15 E. 4. 4. 5. Admitted.]*

14. The plaintiff was relieved against a statute, and ordered to have the possession thereof, because the extender had *received his debt according to the yearly value.* Toth. 276. cites Clethero v. Beckingham. Pasch. 21 Jac. li. B. fol. 951.

[579] (H. a) Scire Facias. Statute Merchant, Staple, Recognizance. In what Cases, and for what Causes.

[1. **I**F a statute merchant be of 100l. and conusee apports the statute, and has several writs of execution of body and land for several parcels thereof, in several counties, scilicet, 20l. in one county, 20l. in another county, and so in other counties, and his body taken in London for 20l. Upon tender of the money in court he shall have writ to the sheriff to deliver him; for the writ of extent in London was to take his body, and to deliver his land and chattels till the 20l. be paid, and not till all the debt was paid, and therefore the sheriff has not any authority to hold him in prison after the 20l. paid. 16 E. 3. Execution 49.]

[2. *But in the said case if the body had been taken before the apportionment, there it had been otherwise; for there he was taken to remain in prison till the debt paid. 16 E. 3. Execution 49.]*

3. *Scire facias issued against A. upon a recognizance entered into by J. S.—A. says, that J. S. at the time of the recognizance was seised of other lands, now in the hands of B. not named in the writ, and prayed a writ against B. to know why the lands in his hands should not be charged as well as his, and the writ was granted, &c. Fitzh. tit. Execution, pl. 37. cites Hill. 41 E. 3.*

4. *If one acknowledges 2 statutes upon his lands one after the other, and satisfies the former statute, but does not vacate it; and the conusee of the later statute takes out an extent upon the lands; this extent may be avoided until the former statute be avoided by a scire facias. (Hill. 22 Car. B. R.) For the law is not to take notice of the private acts done between the parties: and it does not appear, that the former statute is satisfied. But upon the pleading, and an issue upon the scire facias, it will appear, whether*

it

it be or no? 2 L. P. R. 535, 536. tit. Statute Staple and Merchant.

(H. a. 2) Scire Facias; Necessary in what Cases.

See (R) pl. 23. to 28.

1. **A.** Acknowledged a *recognizance* of 250l. to the chamberlain of London, and his successors, and afterwards he acknowledged a *statute staple* of 200l. to B.—B sues execution by a *liberate*, which is not returned: the successor of the chamberlain sues execution in the nature of an *elegit*, and has the moiety of the lands of A. delivered in execution. A. dies. It was resolved in this case, amongst other points, that the execution of the *elegit* was good enough without suing a *scire facias* against B. being by matter of record: but it was said, that if the sheriff had returned the former extent, and the matter had appeared to the court, he ought to have had a *scire facias* against B. 4 Rep. 65. b. Hill. 33 Eliz. Fulwood's case.

2. The cognizor of a statute afterwards granted a rent-charge. The statute was extended, and the cognizee levied his debt, costs, and damages. The grantee distrained for the rent. All the Court held, that this distress was good without suing a *scire facias* against the conusee; for none but the conusor, or his assignee of the land, shall have it, and not the grantee of the rent; and if he cannot distrain then by covin of the conusor he should be without remedy, since he cannot have *scire facias* though the statute be satisfied, and therefore he shall distrain. Jo. 456. pl. 1. Trin. 16 Car. B. R. Harwell v. Burwell.

*[580]

Cio. C. 597.

pl. 19. S. C.

For by

Berkley, the

grantee did

not meddle

with the

possession,

but only dis-

trained for

his rent.

And Croke

held, that

he might

distrain if he will take notice at his peril, that the extent is determined, and the debt, damages, and costs levied, and that he cannot have a *scire facias* because he has no title by record whereupon to ground a *scire facias*; and that the rule does not always hold, that where one comes in by matter of record he ought not to be ousted without a *scire facias* for matter of record; for he whose lands are extended upon an *elegit* upon a *recognizance*, after the debts satisfied, may enter without *scire facias*; but the conusee of a statute (because he is to have costs or damages which are not known) cannot be ousted without a *scire facias*. And adjudged for the grantee.—Mar. 124. pl. 203. & 159. pl. 230. & 207. pl. 247. S. C. accordingly.

(I. a) Statute Merchant, Staple, Recognizance.

Scire Facias *ad Re Habendam Terram*. In what Cases it lies.

[1. IF the money be levied according to the extent by effluxion of time a *scire facias* lies to re-have the land. 21 E. 3. Scire Facias 109. 18 E. 2. Execution 244.]

[2. If part of the money be levied according to the extent, and part is arrear; upon tender of that, which is arrear, in court, a *scire facias* lies to re-have the land within the term, according to the extent: because all appears of record, how much was due, how much levied, and how much arrear. 21 E. 3. Sci. Fac. 109.]

Statute Merchant, the conusor came and surmised, that the conusee had levied his debt except 10l. which he is ready to pay, and brought it into court, and said, that he is ready to tender the costs according as the Court shall award, and prayed *scire facias* to re-have his land, and had

had it by sward as well as upon elegit; though several said, that it is the course upon the elegit and not upon the statute merchant. Br. Scire Facias, pl. 43. cites 47 E. 3, 11.—So upon payment of part and tender of the rest, the same year, fol. 25. *ibid.*—Br. Restitution, pl. 10. cites S. C.

[3. But, in the said case, if he tenders the money to the conusee and not in *court, and the conusee refuses it, yet he shall not have a scire facias upon this ad re habendum terram. 22 Aff. 44.]

* Fol. 489.
Br. Statute Merchant, pl. 24. cites S. C. Per Bank.

4. If the conusee upon a statute merchant makes assignment after he has had execution of the land by the statute, then the tender of the money shall be made to the assignee; quod nota. And quære if it be not good to the conusee himself. Br. Tender, pl. 38. cites 15 E. 3. & Fitzh. tit. Respond. 1.

(K. a) For what Causes it shall be granted.

[*581] [1. IF he who has the extent by statute staple takes more profit ex post facto, by casual profit, which is not extended (to the value of the debt, as it seems), that is to say, by *sward, wreck, *or escheat; upon this matter shewn, a scire facias shall be granted to re-have the land. 2 H. 4. 8. b. † 15 H. 7. 15. Co. 4. Fulwood 67. b. 15 E. 4. 5. b.]

* S. P. And so if any other casualty happens in execution which makes a full satisfaction, he shall have scire facias upon this matter. Br. Statute Merchant, pl. 15. cites 15 E. 4. 5. Per Brian.

† Br. Statute Merchant, pl. 16. cites S. C.

[2. So if he has profit by fishing in a river which runs upon the land extended. 2 H. 4. 8. b.]

[3. [But] if he has levied the money before the term incurred by amending the land, yet no scire facias lies thereupon. 17 E. 3. 36. b.]

[4. But if he has levied part by cutting of wood, and has received the residue, and of this shews his acquittance, the conusor shall have a scire facias. 21 E. 3. 1. adjudged by admittance.]

Br. Statute Merchant, pl. 13. cites S. C.—

Br. Scire Facias, pl. 9a. cites S. C.—Br. Restitution, pl. 10. cites S. C.

* The original is (et). [5. So if he has levied part by taking the profits, and the other can shew how much he has levied in such manner, and tenders the residue * he shall have scire facias. 21 E. 3. 26. b.]

[6. If a man acknowledges a statute to B. and after pays part of the money to B. and receives an acquittance from him, and after B. extends land for all the statute, when he has levied so much upon the extent, that, with what he had received before, all the statute is satisfied, &c. the conusor may have a scire facias against him; for it seems that there is no diversity where part of the money is paid after the extent, and where before. But quære if he be not put to his audita querela.]

Though the conusee upon a statute mer- [7. Upon a general averment that he has levied the money, no scire facias shall be granted, because peradventure he has levied it by amending the land. 17 E. 3. 36. b.]

ch. ii., statute staple, or recognizance in nature of a statute staple, has received the whole debt by execution,

execution, yet cannot the conusor enter; for he must hold the land until he be satisfied not only of his debt, but of his costs, damages, labours, and expences. 2 Inst. 680.

[8. So upon averment that he has levied part, and of part has received the money, and shews acquittance of it, and of the residue is ready to make gree, he shall not have scire facias. 17 E. 3. 43. b.]

[9. If A. recovers debt or damage against B. and in an elegit has a term of B. delivered to him in full satisfaction of the debt, though the term is of more value, yet no scire facias lies in this case, because this is done by the jury, and not by way of extent of the land, but delivered as a chattel. Hill. 11 Ja. B. between Cumin and Brandling. Per Curiam.]

[10. If the conusor after the extent tenders the money to the conusee, and he refuses it, yet he shall not have a scire facias against him to account. 22 Aff. 44. Per Bank.]

Br. Statute Merchant, pl. 24. cites S. C. Per

Bank J. and S. P. but says, that the conusor may enter upon the conusee after such tender and refusal, or may have audita querela; but says quere of the entry.——S. P. Br. Extent, pl. 9. cites S. C. accordingly; but cites 15 H. 7. 15. and 47 E. 3. 11, 12. and 25 contra; for he shall have scire facias and liberate, and otherwise he cannot enter.

[11. [But] if the conusor after the extent renders the money in court, he shall have a scire facias to re-have his land. 21 E. 3. 2. b. 3. 26. b. 15 H. 7. 15.]

Notwithstanding the words of

the statute de Mercatoribus are, that all the goods of the debtor, and all his lands, shall be delivered by reasonable extent * to hold till all the debt be fully levied, yet by good construction the conusor shall have a scire facias upon tender of the debt, with mises and collages; for the land was delivered in nature of a gage, though 17 E. 3. 43. b. and 18 E. 3. 11. seem to the contrary; but in 21 E. 3. tit. Scire Facias 109. and 47 E. 3. 11. a sci. facias was gramed. 32 E. 3. Scire Facias 101. the assignee of the conusor shall have the scire facias. 6 E. 3. 53. accordingly. 2 Inst. 679.

[12. But if the conusee has composted the land before the scire facias granted, he shall have allowance of his charges and costs. 21 E. 3. 2. b. 3.]

[13. When the conusor brings the money into court, if he says that the conusee has cut trees, he shall not have a scire facias to put him to answer to the cutting for damage, as of waste. 21 E. 3. 26. b. 30. b. Contra 21 E. 3. 2, 3.]

[14. But he may have scire facias ad computandum for the profit made by the cutting of the trees, and to re-have his land, all arrears being levied by such casual profit. * 50 E. 3. 16. 15 H. 7. 15. 21 E. 3. 26. b. 30. b.]

* Br. Statute Merchant, pl. 8. cites S. C.

(L. a) Statute Merchant. Scire Facias.

Fol. 484.

[1. **W**HEN the money is levied by casual profit by him who has the land in extent, the conusor may have a scire facias as well as a venire facias; for this is not in disaffirmance of the execution, but in affirmance, and to re-have his land. * 21 E. 3. 1. adjudged. † 50 E. 3. 16.]

Where the conusee is satisfied within the term by casual profit, the conusor shall have thereupon a venire facias, and upon that a scire facias. Kitch. of Courts 232.

ut. Execution, cites 15 H. 7. 14.

* Br. Statute

* Br. Statute Merchant, pl. 19. cites S. C. says, that the conusor shall have *scire facias* against him, and *not venire facias* by award.——Br. Scire Facias, pl. 92. cites S. C.

† Br. Statute Merchant, pl. 8. cites S. C.

[2. If a man sues execution by *elegit* upon a recognizance, the other may after tender the money in court, and shall have *scire facias*. 21 E. 3. 26. b. 30. b. adjudged.]

(M. a) [Scire Facias ad Re Habendum Terram.]
Who shall have it.

[583*] [1. **T**HE tenant of the franktenement of the land extended, though he be a stranger to the record, that is to say, though he is not the conusor, yet he shall have a *scire facias* to re-have the land, if part be levied, and part not, upon tender of the residue in court. 46 Aff. Scire Facias 134.]

[2. If a statute be extended upon land in the hands of several persons who have several franktenements in several parcels, and part is levied, and part not, according to the extent, the one who has a several franktenement of parcel upon tender in court of the monies arrear,* shall have a *scire facias* to re-have the land, though the others do not join with him. 46 Aff. Scire Facias 134.]

The assignee of parcel is not within the act of 32 H. 8. cap. 5. but if there be several assignees, and the land is evicted from them all they are within the act, and remedy of that act, because the whole is evicted from them, and they may have a re-extent for the whole debt, according to the words and meaning of that act. 2 Inst. 679. cites in Marg. 46 Aff. tit. Scire Facias 134.

Which case in 46 Lib. Aff. because it has been often mistaken and misapplied by many, we will truly put the same: A. seized of black-acre and white-acre in fee, acknowledges a statute merchant to J. and infeoffs B. of white-acre, J. sues execution of black-acre out of the possession of A. the conusor, and of white-acre out of the possession of B. A. conveys black-acre to C. in fee, J. tenant by statute merchant assigns his interest to D.—C. the assignee of A. sues a *scire facias* against D. assignee of J. and tenders the money that is behind; D. the defendant pleads to the writ, for that C. tenant of the freehold of white-acre, whereof execution was also sued of record, is not named in the writ to whom this suit was as well given as to the plaintiff; judgment of the writ; but non allocatur, whereby it appears by the rule of the court, that any one feoffee may have a *scire facias*, and tender the whole money to the tenant by statute merchant, or to his assignee. Another exception was taken to the writ, for that every *scire facias* ought to be warranted or grounded upon a record, and this *scire facias* is not grounded upon the record, but maintained upon a suggestion of tendering the money, in which case he ought to have a *venire facias*, and not this writ of *scire facias*; et non allocatur. Whereby it appears, that partly upon a record, and partly upon a suggestion (no *scire facias* being granted without some suggestion) the *scire facias*, upon this certainty of the tender, was maintainable. Lastly, it was excepted against the writ, that it appeared to the Court, that the *scire facias* was brought by the assignee of black-acre against the assignee of tenant by statute merchant, so as each of them, as well of the one part as of the other, plaintiff and defendant, were strangers to the record; et non allocatur, for that it had been often seen that this writ did lie as well between strangers as privies, and the writ of *venire facias* also to make the conusor, &c. to account, &c. Then does Belknap, of counsel with the defendant, put a case upon the statute of Gloucester, cap. 3. It is given by statute (says he) that if the father alien the right of the mother, that the son and heir of the mother shall not be barred, if he has not assets by descent, &c. and other lands may after descend to him from his father, that the alienee of the father shall have recovery against him by *scire facias*; but if lands descend to him afterwards from his father, and he aliens the lands which he recovers as heir to his mother, the alienee of the father shall not have a *scire facias* against the alienee of the heir, which opinion is grounded upon these words in the statute, *donques avera le tenant (id est, the alienee of the father), recovery vers luy (id est, the son and heir of the mother) de la seisin son mere, &c.* And therefore Belknap concludes, that no *scire facias* lies against the alienee in that case, no more here. Whereunto Thorp Chief Justice answers, although it be so in the case put by Belknap, it is given by the statute, &c. wherefore (says Thorp) will you receive the money, or no? Belknap said, yes, if he will tender the mises and collages. Kirton, the mises and collages shall be taxed by the Court. Thorp, they shall not; for we cannot know them; and afterwards he tendered a demi-mark for mises and collages, and the other said they were not sufficient;

sufficient; and the Court held them sufficient. Thorp demanded if he would receive the money, or no, for mises and costages, as he tendered, otherwise we will (said he) re-bail to the party his money. And afterwards he received the same, and the plaintiff had execution. 2 Inst. 679, 680.

[3. If A. acknowledges a statute to B. who extends, and after A. grants the reversion by fine to C. and B. attorns, C. the grantee, though he is not privy to the record, yet upon a surmise that B. has levied the money by casual profits, shewing how, he shall have a scire facias to re-have the land. 32 E. 3. Scire Facias 101. b.]

[4. If a man acknowledges a statute to A. and after acknowledges another statute to B. and after A. extends his statute, and then B. extends his statute, it seems that when A. by any means is satisfied, B. may have a scire facias against him to account, because his statute is to have effect after satisfaction of the first statute.] Br. Statute Merchant, pl. 12. cites S. C.

[5. In the said case, if A. sues execution upon his elder statute, and after B. sues execution upon his statute, and the sheriff returns that it is in execution to A. by an elder statute, and that it is worth 5 marks a year, B. shall have a scire facias against A. upon shewing to the Court that part of the money for which the extent was made to A. is levied according to the extent, and that the residue is acquitted by A. and shews the acquittance to the Court, B. shall have a scire facias thereupon against A. to have the land in execution upon his statute, the sheriff having returned the value of the land by the year. 38 E. 3. 12. b. Brook, Scire Facias 87.] Br. Statute Merchant, pl. 12. cites S. C.

6. The assignee of the conusor after execution had upon a statute merchant shall have a scire facias to re-have the land. Br. Deputy, pl. 18. cites 32 E. 3. and Fitzh. Scire Facias 101. [584]

(N. a) Scire Facias. Against whom it lies.

[1. IF tenant by statute merchant leases parcel of his estate, and lessee levies the debt by casual profit, the scire facias lies against the lessor and not the lessee. 50 E. 3. 16.] Fitzh. tit. Execution, pl. 44. cites S. C. per Belk.

[2. But if tenant by statute merchant leases all his estate, if grantee levies the debt by casual profit, the scire facias lies against him. 50 E. 3. 16. 4 Aff. Scire Facias 134.] Fitzh. tit. Execution, pl. 44. cites S. C. per Belk.

[3. But if he has levied the money before the grant over, the scire facias lies against both. 50 E. 3. 16.] Fitzh. tit. Execution, pl. 44. cites S. C. per Belk.

[4. But Brook in abridging this in title Scire Facias 208. says, that it lies against lessee, but makes a quære of it.]

[5. If the conusee of the statute levies part of the money by casual profit, and * receives the residue, and after grants over his estate, the scire facias may be brought against the conusee. 21 E. 3. 1. adjudged by admittance. But there it does not appear, whether

* Fol. 485.

whether he levied it before the grant over, but it seems it is so to be intended; for his acquittance is shewn.]

Br. Statute
Merchant,
pl. 12. cites
S. C.

[6. If *A. acknowledges a statute to B. and after acknowledges another statute to C. and B. sues execution of the land, and leases his estate to D. and after A. devises the land to his feme for life, and dies, and then C. sues execution of the land, and the sheriff returns that it is extended, and in execution to B. upon an elder statute, and extends the land at five marks a year. In this case C. upon a surmise that part of the money was paid to B. and shews his acquittance, and that the residue is levied according to the extent, and that the feme will not sue the scire facias to re-have the land, he shall have a scire facias against D. to have execution; for otherwise he never shall have execution, and D. has the estate of the conusee. 38 E. 3. 12. b. Brook, Scire Facias 87.]*

* Orig. is
(execution)
but it seems
it should be
(scire fa-
cias). And
this case
seems to be
miscited;
for I do not
observe any
mention of

[7. If conusee *sues execution* upon a statute merchant, and after *assigns it to another*, the conusor may sue * sci. fa. *against the conusee only*, without naming the assignee, and the assignee cannot come, and pray to be received, to save his term, upon surmise that it is brought *by collusion* by conusor to make him lose his term; for if it be so brought, the assignee may have an assise, in which the collusion shall be tried; for it is not within the statute to save the term which is uncertain. 21 E. 3. 1. Adjudged.]

assignee in the year book of 21 E. 3. 1.

[8. If *A. conusee of a statute extends, and after assigns over the extent, and after part is levied, conusor renders the residue of the money in Court, and shews the acquittance of the conusee in Court*, he shall have a scire facias *against the conusee and the assignee*; and if at the return served, the *conusee makes default*, and the assignee comes, and distress awarded against the conusee, and *idem dies* given to the assignee, and at another day the conusee being in ward of the marshal for other cause, and being brought to the bar, but the *assignee makes default*, yet the conusee shall be put to answer the debt, though the monies brought into Court do not belong to him, but to the assignee; for the land shall not be held in gage, if the conusor be ready to pay. 15 E. 3. Respond. 3. Adjudged.]

Br. Statute
Merchant,
pl. 59. cites
S. C.

9 If a man makes *two statutes at two several times*, and the *second conusee his first execution*, the other shall have scire facias against him to have execution, because he is in by the law. Br. Statute Merchant, pl. 37. cites 2 R. 3. 8.

Br. Statute
Merchant,
pl. 59. cites
S. C.

10. *And if the sheriff returns the conusor dead*, the conusee shall have scire facias against the heir and the tertendants, and therefore, it seems that he shall not have the goods. Br. Statute Merchant, pl. 37. cites 2 R. 3. 8.

Ow. 69.
MAYLOY v.
JENNINGS,
S. C. Trin.
42 Eliz.
The co-
nusee sued

11. A statute was *acknowledged in August*, and the land was *fold in November*, a scire facias was sued out in two days after the sale, the lands shall not be charged in the hands of the vendee, but the inrolment of the bargain and sale, after scire facias sued out, shall have relation, and the writ is not brought against the tenant of

of the land, who is the purchaser. 2 And. 160. pl. 88. Mallory v. Jennings and Breden. out a scire facias against the conusor, before the deed was inrolled, and had judgment to have execution. The question was, if the bargainor was a sufficient tenant against whom the execution was sued? After many arguments it was adjudged, that the scire facias was not well awarded, and judgment was given for the plaintiff.

(O. a) [Scire Facias.] How it shall be [as to Costs and Damages.]

[1. IF execution be sued upon a statute merchant, staple, or recognizance in nature thereof, and the land extended and delivered *within the years of the extent by effluxion of time, no scire facias lies to re-have the land without a special surmise that the conusee is satisfied*, as by payment and acquittance, or bringing the money arrear into Court, or by casual profit, or such like; for it may be that the conusee has levied it, and yet the conusor shall not have the land, as if the land be worth 20l. a year, and it is extended at 10l. a year, yet he shall not be aided. 15 H. 7. 15. 32 E. 3. Scire Facias 101.]

[2. But after the years of the extent are past by effluxion of time, a scire facias lies to re-have the land *without any special surmise*; because by intendment the debt is levied, and yet it may be that the damages and costs are not satisfied, or that he has cause to hold over; but this shall come of the other part upon the return of the writ. 15 H. 7. 15.]

the executors. But Brooke says, it seems that the conusee never shall have scire facias to execute statute merchant, nor statute staple, though the conusee dies. Br. Scire Facias, pl. 123. cites S. C.——Br. Statute Merchant, pl. 16. cites 15 H. 7. 14.

[3. After execution, if a scire facias be sued to re-have the land upon surmise that the conusee is satisfied by casual profits, he must shew in special by what casual profits he has levied it, as by cutting of wood, by heriots or ward fallen, otherwise the writ does not lie. 32 E. 3. Scire Facias 101.]

[4. After an execution, and the years expired according to the extent, a scire facias lies to re-have the land, without tender of any sum for costs, damages, * or expences, [but] this shall come in question upon the return of the writ and demand of the other part.]

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* Fol. 486.

[5. [But] a scire facias lies after execution to re-have the land within the term of the extent upon the said surmises that all is paid, or part paid shewing the acquittance and tender of the residue, or of so much in Court, or that all is levied by casual profits, without bringing in, or tender of, any thing in Court for costs or damages before the award of the writ. 46 Aff. Scire Facias 134.]

[6. But 21 E. 3. Scire Facias 101. there, before the award of the writ, costs and damages [were] tendered; for he may so do, but he is not compellable as it seems.]

[7. But in the said cases upon the return of the writ, and shewing of the other part, that he had sustained costs and damages,

mages, then he ought to tender in Court the costs and damages. 46 E. 3. Scire Facias 109.]

[8. But in the said cases if the plaintiff in the scire facias tenders a sum for costs and damages, it seems the Court is to adjudge whether that which is tendered be sufficient.]

The costs and damages shall be taxed by the Court; per Kirton, but contra by Thorp; for he said

[9. But 46 Ass. Scire Facias 134. it is said, that the Court shall not adjudge whether it be sufficient, but the defendant ought to accept or refuse it at his peril, and so it was there done; but it seems the Court may adjudge it well enough, as 15 H. 7. 16. Co. 4. Fulwood 67. b. Upon statute staple the Chancellor shall adjudge it; for he may assess it as well as a jury.]

that they cannot know them. 2 Inst. 680. cites 46 Ass. tit. Scire Facias 134.

By some of the justices the conusee upon statute merchant, or staple, shall recover his costs, damages, and expences, but they were of different opinions as to the manner how he shall be recompenced of his damages; Fairfax said that it shall be where the years are expired, and the conusor sues scire facias to rehave his land, then the conusee may allege his damages and costs, and the Chancery shall assess them at discretion. Br. Statute Merchant, pl. 16. cites 15 H. 7. 14.

(P. a) Scire Facias *ad computandum*. In what Cases it shall be *ad computandum*.

[1. IF tenant by statute merchant holds over his term according to the extent, the conusor shall have a scire facias *ad computandum* against him, and by this he shall be restored to all the issues which he has taken over the sum due. 18 E. 2. Execution 244.]

Elegit was extended upon a recognizance, and the debtor came and

[2. If the tenant by statute merchant, or staple, within the term levies the sum arrear by casual profit, there the scire facias may be to rehave the land, and *ad computandum*; because the sum which he has levied by the casual profit is not certain till the account made. 32 E. 3. Scire Facias 101. Such writ granted.]

tendered the money to the Court, and prayed scire facias to rehave his land, and said that he had cut trees, and prayed that he by the same writ should answer to the waste, and had it accordingly, and at the day he did not tender the money as above; for he said that after this the defendant had levied all by casual profits, and 8l. more, and prayed to rehave his land, and that the defendant render the 8l. and answers to the waste, and the defendant demanded judgment of the writ, for by reason of the waste he ought to have had writ of account; and because those two points could not well stand in one writ, therefore the plaintiff prayed to rehave his land, and relinquished the other points, and had it by award. Br. Scire Facias, pl. 93. cites 20 E. 3. 2. 30.

[587] 3. Scire facias *ad computandum* does not lie against conusee upon a statute merchant or staple; per Bank J. quod nota bene. Br. Scire Facias, pl. 153. cites 22 Ass. 44.

But if he had leased over part, and not the whole, scire facias

4. If a man has execution upon a statute merchant, and the conusee leases all his estate over to one who levies the money by casual profits, in this case scire facias *ad computandum* lies against the lessee. Br. Statute Merchant, pl. 8. cites 50 E. 3. 16. Per Belk.

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(P. a. 2) Avoided

(P. a. 2) Avoided for what Cause ; and Pleadings.

1. **I**N *scire facias* upon a recognizance against *tertenants* after the death of the *conusor*, they pleaded, that one *A.* held so much of the same land charged, and is not warned, judgment of the writ; and because the party could not deny it, the writ was abated, &c. Fitzh. tit. Execution, pl. 139. cites Trin. 17 E. 2.

2. If execution be made on a statute merchant, and the *tertenant* brings *assise*, the other cannot plead the execution in bar, unless the *liberate* be returned; per Poole; quod Mowbray concessit, if he be a stranger to the recognizance; contra if he be privy to the recognizance. Br. Assise, pl. 214. cites 17 Ass. 24. Brooke says, nota the difference by him, and quære; for he that was grieved was purchaser after the recognizance made.

3. In *assise* by statute merchant payment and acquittance is no plea; for if execution was made there, notwithstanding there be payment and acquittance, the defendant is put to *audita querela*. Br. Statute Merchant, pl. 26. cites 28 Ass. 7.

4. Note, it appears often in the book of *assise*, that he who pleads that the land was delivered in extent by statute merchant, *elegit*, &c. and justifies his plea in bar by it, ought to aver that the monies are not yet levied. Br. Pleadings, pl. 63. cites 31 Ass. 28.

5. In *assise* brought against tenant by statute merchant, he pleaded that he was *seised* [and admitted good] and yet he has only a chattel. Br. Assise, pl. 348. Per Brooke upon 38 Ass. 4.

6. *Scire facias* against *R.* as son and heir of *B.* to have execution out of a recognizance made to the plaintiff by the said *B.* Pole said, the writ does not surmise, that we have land by descent; and if we have not land by descent, the writ does not lie against us; judgment of the writ. Prisot said, in debt against the heir he shall not say, that he has land by descent. Ascue said, they are not alike; for his declaration shall be comprehended in the *scire facias*, and not so in debt, by which the writ shall be sued against him as *tertenant* if he knows any thing to say why he should not have execution of the land which his father had at the day of the recognizance made; for of this you shall have execution, &c. and of no other land; quod Curia concessit. Fitzh. tit. Execution 135. cites Mich. 27 H. 6.

7. A man sued execution of a statute merchant, and had *capias* out of the Chancery returnable before the justices of C. B. 15 Hill. and the sheriff returned, *non est inventus*. Littleton prayed an *alias capias* and *extendi facias*, and could not have it without shewing the obligation; and if the party be taken and brought to the bar, and no obligation is * to be shewn, he shall go at large; per Prisot. And so see clearly, that the statute ought to be shewn at first; for there is not any inrolment of it. Br. Statute Merchant, pl. 18. cites 37 H. 6. 6.

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And per Littleton, if a man sues execution in Chancery upon a statute staple he shall shew the obligation to have the capias, but for the writ shall issue to take

mages, then he ought to tender in Court the costs and damages. 46 E. 3. Scire Facias 109.]

[8. But in the said cases if the plaintiff in the scire facias tenders a sum for costs and damages, it seems the Court is to adjudge whether that which is tendered be sufficient.]

The costs and damages shall be taxed by the Court; per Kirton, but contra by Thorp; for he said

[9. But 46 Ass. Scire Facias 134. it is said, that the Court shall not adjudge whether it be sufficient, but the defendant ought to accept or refuse it at his peril, and so it was there done; but it seems the Court may adjudge it well enough, as 15 H. 7. 16. Co. 4. Fulwood 67. b. Upon statute staple the Chancellor shall adjudge it; for he may assess it as well as a jury.]

that they cannot know them. 2 Inst. 680. cites 46 Ass. tit. Scire Facias 134.

By some of the justices the conusee upon statute merchant, or staple, shall recover his costs, damages, and expences, but they were of different opinions as to the manner how he shall be recompenced of his damages; Fairfax said that it shall be where the years are expired, and the conusor sues scire facias to rehave his land, then the conusee may allege his damages and costs, and the Chancery shall assess them at discretion. Br. Statute Merchant, pl. 16. cites 15 H. 7. 14.

(P. a) Scire Facias *ad computandum*. In what Cases it shall be *ad computandum*.

[1. IF tenant by statute merchant holds over his term according to the extent, the conusor shall have a scire facias *ad computandum* against him, and by this he shall be restored to all the issues which he has taken over the sum due. 18 E. 2. Execution 244.]

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take the body and seise the goods returnable in the same Court; and at the day of the return he shall have liberate there; but upon statute merchant he shall have capias, and after writs to extend the land in all counties that he will; which capias is returnable before the justices of C. B. which is another Court, and therefore there he shall shew the obligation again; quod Danby and Prisot concesserunt. Br. Statute Merchant, pl. 18. cites 37 H. 6. 6.

8. And per Prisot, if obligation be burnt after shewing, the plaintiff shall not have execution in Bank. Br. Statute Merchant, pl. 18. cites 37 H. 6. 6.

9. And if no obligation was made but only recognizance taken, and the Chancery awards capias, C. B. shall not make execution upon it for tort, &c. Br. Statute Merchant, pl. 18. cites 37 H. 6. 6.

10. 2
statutes
after the
recognizance
acknowledge
the same.

S. 8.
shall not
the clerk
that the
entered
ledging
deration, lands liable to the said statute, or any rent, lease, or profit out of the same.

acts, that the whole contents of the staple shall within six months be entered in the office of the clerk of S. cap. 6. shewing the statute so the clerk of recognizances shall enter S. 8d. for every entry.

such statute shall be acknowledged, and the acknowledging, bring unto the clerk so acknowledged, to the intent thereof; every such statute not so persons as shall after the acknowledging for money, or other good consideration, lands liable to the said statute, or any rent, lease, or profit out of the same.

11. Error in debt upon a judgment given in debt before the mayor, &c. of the staple upon a bond. And upon error brought, the error assigned was, 1st, That it is not averred, that the parties were merchants at the time of the debt contracted: it is averred, that they were merchants at the time of the plaint levied; but that is not enough: for the statutes of 27 E. 3. cap. 8. & 36 E. 3. cap. 7. require, that one of them at least shall be a merchant. 2dly, It does not appear, that the bond was given for a matter concerning merchandise. But the writ of error was quashed, because the writ was directed majori, aldermannis, & vicecomitibus civitatis Bristol, to remove the record of a judgment given upon a plaint levied before them; and the record removed was of a judgment given upon a plaint levied before the mayor and constables of the staple. 2 Ld. Raym. Rep. 819. Mich. 1 Ann. B. R. Gibbons v. Saunders.

(Q. a) Saver Default.

This title stands in Rollas here, but seems to be placed here by mistake; and this being a

[1. IT is good saver default, that he was imprisoned in such a common prison at the time, &c. though it was objected, that he might have made attorney for him. 3 H. 6. 46. b.]

place where no gentleman will be looking after, or expect to find it, I shall add no notes in this place, but refer to title DEFAULT.

[2. The

[2. The *same* land though he was imprisoned for a trespass done by himself. 3 H. 6. 6. 46. b.]

* [3. It is good fayer of default, that he was hindered by increase of water. 3 H. 6. 46. b.]

For more of Statutes and Statutes [Merchant, &c.] in general, see Audita Querela, Entry, Execution, Holding over, Prerogative, Recognizances, and other proper Titles.

Stealing.

(A) By Owner or Possessor of Goods, as by Bailment, &c. In what Cases such taking shall be Felony.

1. **A** FORESTER was indicted, that he feloniously cut and carried away trees, and the justices would not arraign him; for the trees are annexed to the soil, which cannot be said felony notwithstanding that a stranger had done it; and the trees, as here, were in the keeping of the forester. Br. Corone, pl. 76. cites 12 Aff. 32. *But it was said, that if the lord had abated the trees, and after the forester had carried*

them away, that he should be arraigned of this; quære tamen. Ibid.

2. It was said, that if a man bails goods to another to keep, and after the owner, who bailed them, retakes them feloniously, that he shall be hanged, and yet the property was in him; and Norton said, that it was law, &c. Br. Corone, pl. 45. cites 7 H. 6. 42. *A man may take his own goods feloniously, as when he bails them*

to J. N. and after steals them to the intent to charge the bailee of damages, this is felony; per Needham. Brook says, quære inde. Br. Corone, pl. 159. cites 13 E. 4. 9.

3. W. was indicted, for that he had goods in his keeping, and that he feloniously took and carried them away; and it was doubted if a man who has goods in his possession, can feloniously carry them away: it seems he cannot; for if the taking be not felony, the carrying away cannot be felony; and so it appears elsewhere. Br. Corone, pl. 45. cites 7 H. 6. 42. *It was held by all in the Exchequer Chamber, except Needham, that where goods are bailed to a*

man, he cannot take them feloniously. Br. Corone, pl. 159. cites 13 E. 4. 9. — If the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. *And*

And from this ground it has been holden, that one who finds such goods as I have lost, and converts them to his own use *animo furandi*, is no felon, and a *fortiori*, therefore it must be law, that one who has the actual possession of my goods by my delivery for a special purpose, as a carrier who receives them in order to carry them to a certain place, or tailor who has them in order to make me a suit of clothes, or friend who is intrusted with them to keep for my use, cannot be said to steal them by imbezzling of them afterwards. Hawk. Pl. C. 85. cap. 33. S. 2, 3.

Hawk. Pl. C. 90. cap. 33 S. 7. 4. But it was held that the *bailee* after his possession determined, may commit felony of the goods to him delivered; as where they are bailed to carry to my house, and he carries them there, and after takes them secretly, this is felony. Br. Corone, pl. 159. cites 13 E. 4. 9.

animo furandi, he is guilty of felony, because the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger.

Sce pl. 8.— 5 But where a *taverner* delivers a piece [of plate] to the guest in the tavern, and he takes it away secretly, this is felony; for it was never out of the possession of the house. Br. Corone, pl. 159. cites 13 E. 4. 9.

Baynes's case, S. P. the owner, his wife and servants then being in the house; and held not to be burglary, but to be such a robbery, whereby he was ousted of the benefit of his clergy, by the statute 5 & 6 E. 6. cap. 9. and was hanged.

A silk-throwster had men that came to work in his own house, and the workmen stole away part of it. 6. A merchant alien bails a fardel of goods to a carrier to carry it to Exeter, and by the way he opens the fardel, and takes part of the goods; and the justices sat upon it in the Exchequer Chamber, and after made report to the Chancellor that it was felony; for the carrier had no power but only to carry it, and therefore when he did otherwise *animo felonico*, it is felony notwithstanding the delivery: and this by the opinion of several justices, but not of all. Br. Corone, pl. 159. cites 13 E. 4. 9.

It was agreed at the sessions at the Old Bailey, 12 October 1664, by Hide Ch. J. Kelyng and Wild, that this was felony, notwithstanding it was delivered to the party; for it was delivered only to work, and so the intire property remained only in the owner. Kelyng 35. Anon — Hawk. Pl. C. 90. cap. 33. S. 5. says, it has been resolved that even those who have the possession of goods by the delivery of the party, may be guilty of felony by taking away part thereof, with an intent to steal it; as if a carrier open a pack, and take out part of the goods, or a weaver who has received silk to work, or a miller who has corn to grind, take out part with an intent to steal it; in which cases it may not only be said that such possession of a part distinct from the whole was gained by wrong, and not delivered by the owner, but also that it was obtained basely, fraudulently and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered. Hawk. Pl. C. 90. cap. 33. S. 5.

7. A lord cannot be principal of goods of his *villain*; for if he takes them secretly, it is no felony; for he has title to take them, and therefore it seems that he may be accessory. Br. Corone, pl. 215. cites 29 H. 6.

If the shepherd steals the sheep, or a butler the plate in 8. If a man commits the keeping of his goods to his servant, the servant cannot take them feloniously; for they are in his possession. Br. Corone, pl. 154. cites 10 E. 4. 14. Per Billing.

their keeping, or a servant other things in their keeping, this is felony per Hussey, who said that a butler was hanged for such an act; but per Brian, it cannot be felony; for he cannot take that vi & arms which is in his custody; and the justices were of the same opinion, therefore quare. Br. Corone, pl. 136. cites 3 H. 7. 12.

* S. P. And so if a cook carries away the stuff, it is felony; for the same was always in the possession of the master. Br. Corone, pl. 159. cites 13 E. 4. 9.

If I ball a bag of money to my servant to keep, &c. and he fliet with it, this is felony; for when he is in my houle to keep it, there it is in my own possession. Br. Corone, pl. 58. cites 21 H. 7. 14. Per Cutler Serjeant.

As my butler has my plate to keep, and he who keeps my horse, if those go away with it; it is felony. Br. Corone, pl. 58 cites 21 H. 7. 14. Per Cutler Serjeant.

But if I deliver a horse to my servant to ride in an errand, and he goes away with it, or I send my servant with money to pay at L. and he goes his way with it, it is not felony, the reason is that I delivered it out of my possession, but the other remains in my possession; note the diversity, which Pigot, who demanded the question, did not deny, but affirmed it. Br. Corone, pl. 58. cites 21 H. 7. 14.

Serjeant Hawkins says it seems generally agreed, that one who has the bare charge, or the special use of goods, but not the possession of them, as a shepherd who looks after my sheep, or a butler who takes care of my plate, or a servant who keeps a key to my chamber, or a guest who has a piece of plate set before him in an inn, may be guilty of felony in fraudulently taking away the same; for in all these cases the offence may as properly come under the word cepit, the injury to the owner is as great, and the fraud as secret, and the villainy more base than if it had been done by a stranger. Hawk. Pl. C. 90. cap. 33. S. 6.

9 Feme is no felon by taking the goods of her baron, because she has colour, therefore a fortiorari the very owner. Br. Corone, pl. 141. cites 5 H. 7. 18.

10. By the statute 21 H. 8. cap. 7. *If a servant shall have a casket, jewel, or money, or goods or chattel of the master delivered to him by the master to keep, and such servant withdraw himself from the master, and go away with such casket, &c. to the intent to steal the same, and defraud the master, &c. or else being in the service, without assent of the master, imbezzele the same casket, &c. or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it, he shall be guilty of felony, if such casket, &c. be of the value of 40s.*

In the construction of this statute, the following opinions have been holden, 1st, That it extends only to such as were servants to the owner of

the goods, both at the time when they were delivered. and also at the time when they were stolen. [591] 2dly, That it is strictly confined to such goods as are delivered to keep, and therefore that a receiver, who having received his master's rents, runs away with them, or a servant who being intrusted to sell goods, or to receive money due on a bond, sells the goods, &c. and departs with the money, is not within the statute, but that a servant who receives his master's goods from another servant, to keep for the master, is as much guilty as if he had received them from the master's own hands, because such a delivery is looked upon as a delivery by the master.

3dly, That it includes not the wasting or consuming of goods, however wilful it may be, nor the taking away of an obligation, or any other bare chose in action.

4thly, That it extends not to the taking of such things whereof the actual property is not in the master at the time; and therefore, that if a servant having money, or corn, &c. delivered to him, melts down the money of his own head, without the command of his master, into a piece of plate, or turns the corn into malt, and then runs away with them, that he is not within the statute, because the property of these things is so far changed by altering them in such a manner, that they cannot be known again, and the master cannot afterwards take them without a trespass; but it is agreed, that if a servant makes a suit of clothes of cloth, or a pair of shoes of leather, delivered to him by the master, and then runs away with them, that he is within the statute, because the property is no way altered; and even in the first case whether the very taking of the plate or malt be within the statute, or not, yet I can see no reason why the whole act of the servant taken together, should not be looked upon as a conversion of the master's goods to his own use, with an intent to steal them, which brings it within the express letter of the statute; and it has been resolved, that a servant who changes his master's money from silver to gold, and then runs away with it, &c. is within the statute; and I can see no good distinction between that and the present case. Hawk. Pl. C. 92. cap. 33. S. 12, 13, 14, 15.

(B) Of what Things it shall be said Felony.

1. **INDICTMENT** that W. N. feloniously took and carried away six boxes of charters concerning the inheritance of W. C. in the boxes being. Per Nele, that which ought to be felony, The things stolen ought to have some worth in them.

themselves, and not to derive their whole value from the relation they bear to some other thing which cannot be stolen, as paper or parchment

ought to be of the value of 12d. and of charters there is no value. And per Choke, it is no felony; for charters *are real, and not chattels real, and therefore no felony*; and the box is of the nature of the charters; for he who is attainted of felony shall not forfeit his charters of his land, but he shall forfeit a ward and term for years; for those are chattels real; to which all the justices agreed. And after the defendant was dismissed of the indictment of the box; for it is not felony for the cause aforesaid. Br. Corone, pl. 154. cites 10 E. 4. 14.

on which are written assurances concerning lands, or obligations or covenants, or other securities for a debt, or other chose in action; and the reason, wherefore there can be no felony in taking away any such thing, seems to be, because, generally speaking, they being of no manner of use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore need not to be provided for in so strict a manner as those things which are of a known price, and every body's money; and for the like reason it is no felony to take away a villain, or an infant in ward, &c. Hawk. Pl. C. 93. cap. 33. S. 22.

Hawk. Pl. C. 93. cap. 33. S. 23.

2. A man has a mere property in some things that are tame by nature, and yet in respect of the *baseness of their nature* a man shall not commit any larceny, great or small, though he steal them, as of mastiffs, blood-hounds, or of other kind, dogs, or of cats; and likewise it is of their whelps or young. 3 Inst. 109.

3 One W. H. had in the night *digged up the graves* of diverse several men, and of one woman, and *took the winding sheets* from the bodies, and buried the bodies again. Resolved that the property of the sheets was in the executors, administrators, or other owner of them; for the dead body is not capable of any property, and the property of the sheets must be in some body; and according to this resolution he was indicted of felony at the next assizes; but the jury found it but petit larceny, for which he was whipped, as he well deserved. 3 Inst. 110. at Leicester Assizes in Lent, 10 Jac. Hain's case.

[592] (C) In what Cases the stealing *the same Things* may be *Felony in one Respect*, and not so in another Respect.

S. P. Arg. and admitted by the Court. Vent. 187. Hill. 23 & 24 Car. 2. B. R. in case of Emerson v. Emerson.—Hawk. Pl. C. 93. cap. 33. S. 21.

1. **I**F one who has no right, *cuts down trees, and lets them lie, and at another day afterwards carries them away*, this may be felony; but not where they are taken and carried away at the same time. Allen 82, 83. Per Cur. Mich. 24 Car. B. R. in case of Udall v. Udall.

2. So if a man cuts and carries away *corn* at the same time, it is not felony, because it is *but one act*; but if he cuts it and lays it by, and carries it away afterwards, it is felony; per Hale Ch. J. Mod. 89. pl. 35. Mich. 22 Car. 2. B. R. Anon.

33. S. 21. says, that such goods, the stealing whereof may amount to felony, ought to be no way affixed to the freehold, and therefore it is no larceny, but a bare trespass to steal corn or grass growing, or apples on a tree, or lead on a church or house; but it is larceny to take them, being severed from the freehold, whether by the owner, or even by the thief himself, if he sever them at one time, and then comes again at another time and takes them. And the general reason of this

this distinction between chattels fixed to a freehold, and those lying loose, perhaps may be this, because the former not being removed without trouble and difficulty, are not so liable to be stolen, and therefore need not to be secured by so severe laws as the others require.

(D) *Indictment and Pleadings.*

1. **Q**UOD felonice abduxit equum, is not good; for it should be felonice cepit & abduxit. Br. Corone, pl. 159. cites M. 2 E. 3. and Itin. Not. 8 E. 3. The indictment saith felonice cepit & asportavit,

yet the removing of the things taken, though he carry not them quite away, satisfies this word asportavit; as if a guest takes the coverlet or sheets off his bed, and rising before day, takes the coverlet or sheets out of the chamber where he lay into the hall, to the intent to steal them, and went to the stable to fetch his horse, and the hostler apprehended him; and this was adjudged larceny; and the coverlet or sheets were carried away, being removed from the chamber to the hall, albeit they were still in the house of the owner. So if a man's horse be in his close, and one takes him, and as he is carrying him away he is apprehended before he gets out of the close, yet this is sufficient to make it larceny. 3 Inst. 108. 109. — Hawk. Pl. C. 92. cap. 33. S. 18. S. P. Neither is he less guilty who pulls off the wool from another's sheep, or strips their skins, with an intent to steal them, or he who intending to steal them, or he who intending to steal plate takes it out of a trunk wherein it was, and lays it on the floor, and is surprised before he can carry it off.

For more of Stealing in general, see *Feræ Naturæ, House*
(C) *Lodger, Master and Servant*, and other proper Titles.

Steward of Courts.

(A) *His Office and Authority, and how considered.*

1. **I**N * Court Baron the suitors are judges, but in leet the steward is judge. Br. Judges, pl. 18. cites 12 H. 7. 16. * Br. Jurisdiction, pl. 117. S. P.
cites Fitzh. Det. 177. and not the lord nor his steward. — So in hundred, and in the county; but in Court of Piepowders the steward is judge; for there are no suitors; for where suitors are, they are judges, and not the steward. Br. Judges, pl. 20. cites 6 E. 4. 3. Per Choke.
S. P. In county court, court baron, and hundred, as well in writ of right patent as in justicies and other suits there; and the sheriff, steward, and bailiffs are not judges [593]
there; quod nota bene. Br. Judgments, pl. 118. cites 39 H. 6. 5. — S. P. And the bailiff and sheriff are only ministers. Br. Court Baron, pl. 11. cites 6 E. 4. 3.

2. Any that supplies another's place, or that is in any employment deputy to another, may according to the true sense of the word be termed a steward; as the high steward of England, be-

* But a lord of a manor cannot be his own steward or bailly. D. 70. b. pl. 41. Arg. in case of Wythers v. Iſham.

cause the king appoints him in divers matters to exercise his place; and so the under sheriff may be termed by the name of the sheriff's steward, being his deputy. And how properly the lord's steward is so named, any man may judge by this, that the whole authority of the steward is derived from the lord, as from the head; and not only so, but withal he ** represents the lord's person* in many employments; for in the lord's absence he sits as judge in Court to punish offences, determine controversies, redress injuries, and the like; and farther, some things he performs in the lord's name, and not in his own name; for if the steward admits any copyholder, or by special authority, or particular custom, licenses a copyholder to alien, the admittance and licence shall be made in the lord's name, and the entry in the court-roll shall be, quod dominus per senescallum admisit & licenciavit, and not that the steward did admit or license. Co. Compleat Copyh. 55, 56. S. 45.—S. P. Co. Litt. 61. a. b.

3. In a court baron the *suitors* are the judges in real causes, but not in personal; per Shute J. Godb. 49. pl. 60. Mich. 28 & 29 Eliz. B. R. Anon.

By custom in a hundred court the steward may be judge, and not the suitors. Le. 316. Anon.

4. By prescription a Court may be claimed to be held before the steward. Godb. 68. pl. 83. Mich. 28 & 29 Eliz. B. R. in case of LOVEL v. GOLSTON, cites 6 E. 4. but if there be no custom or prescription to warrant it, then as 4 H. 9. is, it is *coram seneschallo & seclatoribus*. And per Gaudy, every court baron is to be holden before the suitors, if there be no prescription to the contrary: but a leet always before the steward. And it was said at the bar to be the form of pleading in the book of entries, that in real causes the Court was held before the suitors, and in personal causes before the steward. Godb. 69. pl. 83. in case of Lovel v. Golston.

5. A steward is an *officer of trust*; for he enters plaints in the Court, and surrenders, and although he has not a judicial place, yet he has a *ministerial* place, and the lord and tenants repose their trusts in him, and is also an *office of skill*. Arg. 4 Le. 244. pl. 397. Pasch. 8 Jac. C. B. in case of the Earl of Rutland v. Spencer.

6. The steward is *but a clerk*, and *not a judge*; for he shall not be named in a writ of false judgment, nor shall hold plea of any actions but under 20s. Per Walmsley J. 2 Brownl. 335. Pasch. 8 Jac. C. B. in the Earl of Rutland's case.

Reym. 12. Anon. but seems to be S. C. and the Court inclined

7. Stewardship of a court baron is a *private thing*, and does not concern the administration of justice. Sid. 40. pl. 5. Pasch. 13 Car. 2. B. R. in Stamp's case, said by Twissden to have been so adjudged in this Court.

that a mandamus lay to restore one to a stewardship of a court leet, but not of a court baron. But it was adjourned, and precedents ordered to be searched. — See Mandamus (E).

2 Lev. 18. Mich. 23 Car. 2. in B. R. The

8. Steward of a court baron is *judge* of that part of the Court that concerns the copyholders, and is *register* of the other. Per Hale Ch. J. Vent. 153. Mich. 23 Car. 2. B. R. Hies's case. King v. the Churchwardens of Kingscleere seems to be S. C. and therefore Hale Ch. J. said, that he is an officer of justice, unless he be steward at will only. (B) His

(B) His Power, as to Fines and Amercements.

1. IF any suitor present in Court *refuse to be of the jury*, or if any make another such contempt, or *any contempt* or disobedience in a court leet, the steward may *set a fine* upon him, without affirming by *affeerors*. But when one is amerced that shall be affected. Kitch. of Courts 84. tit. Authority of the Steward, cites 10 H. 6, 7.

2. All *finer* in a leet may be assessed by the steward, and all *amerciements* by the affeerors, and in the avowry there for the amerciament, the defendant alleges *prescription* in the usage of this assessing by affeerors; per Frowick and Kingsmill J. Kelw. 65. pl. 5. Trin. 20 H. 7. Anon.

3. In replevin the defendant prescribed to distrain for all amerciements in the manor, &c. and that the plaintiff being a copyhold tenant, was presented by the homage for *not repairing a copyhold tenement*, for which the *steward amerced him 10s.* it was held, that the steward might assess fines for a contempt, but could not amerce without a *prescription*. 1 L. 242. pl. 327. Mich. 32 & 33 Eliz. B. R. Blunt v. Whiteacre.

4. For such *offences* as are *within the consuance of the steward, as jud e, and of which he has the view*, he may assess a fine, but not otherwise *without presentment*. So that for not coming to Court, and doing suit, he cannot fine without presentment; for non constat to him, if the person was resident within the leet or not, or what cause he had for his absence. Cro. E. 241. Trin. 33 Eliz. B. R. Hall v. Turbet.

5. It was objected that an amerciament, for which the avowry was, ought to be by the suitors, being *in a court baron*, they being judges there, and not by the steward. But resolved well enough; for it is the common *course throughout the realm*, that the amerciements are assessed by the steward. Cro. E. 748. pl. 1. Pasch. 42 Eliz. B. R. Rowleston v. Alman.

(C) His Power, as to the Jury.

See (D) pl.
2.—(E)
pl. 3

1. IF a jury in a leet after an oath made to present the *articles* of the leet, *refuse to make presentment* according to their oath, the steward who is judge there may *assess a fine* upon every one of them at his discretion for his concealment and contempt. D. 211. b. pl. 31. Pasch. 4 Eliz. Anon. S.P. Kitch. of Courts 84. tit. Authority of the Steward, cites 10 E.

2. If the jury *conceal any thing*, the steward may *impanel another jury to inquire* of the concealment, and if that be found they shall forfeit 20s. to the lord of the manor. Kitch. of Courts 32. tit. Charge in Court Leet. 4. 4.

Sec(A) pl. 1. (D) His Power, as to punishing Offences in Court.

Br. Ley-
Gager, pl.
99. cites S. C.
— 8 Rep. pl. 36. cites 10 H. 6, 7.
98. b. Arg.
cites S. C. in Griesly's case.

1. IF a titthingman refuses to make presentment in a leet, the steward shall impose a reasonable fine upon him. Br. Lect.

[595] 2. If one of the jury departs without giving verdict the steward may fine him. Arg. 8 Rep. 38. b. in Griesly's case, cites Lib. Intrat. Amerciament in Det. fol. 449.

8 Rep. 38.
a. S. C. ac-
cordingly.

3. A person inhabiting within a leet was *chosen* for constable by the homage, but refusing to be sworn to execute the office *went away out of Court in contempt* of it, and was fined by the steward for this contempt 5l. and adjudged good. Sav. 93. pl. 173. Trin. 30 Eliz. Griesly's case.

Mo. 47a.
pl. 675. S. C.
accord-
ingly. —
Ow. 113.
S. C. And
Gawdy at
first was of
opinion
against the
action, but
afterwards
he changed
his opinion,
and con-
curred with
the other justices ; whereupon judgment was given for the plaintiff.

4. The steward telling one who was present, that he was a suitor to the Court which he then held, and that he ought to be sworn to inquire, &c. who replied, *in saying so, thou liest*; for which he set a fine of 20s. upon him. And in an action of debt brought for this fine, upon nil debet pleaded, the plaintiff had a verdict and judgment; and upon a motion to set it aside all the Court held, that it was an apparent contempt and abuse of the steward, he being a judge and in his authority; and that he himself might assess a fine for such contempt, and that debt lies without any prescription alleged to assess such fines, or to have an action; and judgment for the plaintiff. Cro. E. 581. pl. 4. Mich. 39 & 40 Eliz. B. R. Lincoln (Earl) v. Fisher.

There is no Court which can fine but may imprison also, unless it be a leet, which is the phoenix; for the steward may fine but not imprison. Roll. Rep. 35. Per Coke Oh, J. Trin. 12 Jac. in Cam. Scacc. in the case of Bullen v. Godfrey.

5. Popham said, that if any *misdemean him* in a leet *in a very outrageous manner*, the steward may commit him. Ow. 113, in the case of the Earl of Lincoln v. Fisher.

(E) Punishable in what Cases.

1. INDICTMENT was of felony done in D. where there was no such vill in the same county, by which the justices would not arraign him, but let him by mainprize, and awarded *capias against the lord of the leet and his steward for taking of such indictment*. Br. Corone, pl. 193. cites 41 Ass. 30.

2. 1 Jac. 1. cap. 5. Enacts, that no steward, deputy steward, or other under steward of any court leet, shall, directly or indirectly, take, receive, or make benefit to his own use, in money, goods, or any other thing, to the value of 12d. by virtue or colour of any demise or grant of any of the profits, perquisites, or amercements of any such courts

courts which rightfully belong to the lord, on pain of 40l. for every offence, and of being disabled of being steward of such Court or any other: one moiety of the forfeitures to the crown, and the other to the prosecutor.

3. An information in nature of a *quo warranto* was moved for against the steward of a court leet for *impannelling a jury not duly summoned*, which the bailiff is the proper officer to do; and they should all be freeholders: for they only have a right to be jurymen. But no freeholders were summoned; and six other persons, who had no right, being present in Court, were sworn; and six freeholders, being likewise in Court, refused to be sworn because they were not summoned; neither would they serve with those who had no right to be of the jury; whereupon the steward swore six more; and the jury, thus constituted by the steward of twelve persons who had no right to be jurymen, chose the bailiff and constables. This being the fact, a rule was made for the defendant to shew cause why an information should not go against him. 8 Mod. 135. Trin. 9 Geo. 1724. The King v. Harrison.

(F) *Appointed how.*

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1. **T**HESE stewards for the most part have patents for their offices, yet they may be *retained by parol*; and this retainer by parol is as *effectual* in all points *before discharge*, as the most effectual institution by patent; for a steward thus retained *may take surrender out of Court, or make voluntary admittances*, or any other act incident to the office of a steward, as well as a steward instituted by patent. Co. Compleat Copyh. 56. S. 45. S. P. Co. Litt. 61. b. S. P. Kelw. 158. b. pl. 6. Mich. 2 H. 8. by Fineux, Brudenel and Coningsby J. accord-

ingly.—D. 248. pl. 79. Hill. 8 Eliz. S. P. held by the same justices, which, and also the same being in the very words of Kelw. shews it to be only a transcript.—Godb. 142. pl. 175. Trin. 31 Eliz. C. B. in case of *BLAGROVE v. WOOD*. Walmesley J. held, that he may be steward by word only in possession, that is, when he holds a Court in possession; but he cannot be steward out of Court without a patent, because he is then out of possession; and therefore it was the opinion of the whole Court, that the surrender out of the Court to the steward by word was not good.—Le. 227. pl. 309. Pasch. 33 Eliz. C. B. S. C. argued, and there a difference was taken between a steward of a manor, and a steward of Courts, that a steward of a manor may take surrenders in any place, but otherwise it is where a steward is retained to keep Courts, that all his power is within the Court, and not without. But this difference was denied of the other side, and the cause was adjourned.—Lord of a manor may retain one to be a steward of his manor by parol, and to hold the Courts thereof, and this retainer shall serve till he be discharged. 4 Rep. 29, 30. pl. 19. Pasch. 36 Eliz. Down v. Hopkins.—Cro. E. 323. pl. 11. S. C. but S. P. does not appear.—4 Rep. 30. pl. 20. Trin. 41 Eliz. B. R. Harry v. Jay, S. P.—And where in ejectment the question was, if baron and feme copyholder, in right of his feme, surrender out of Court into the hands of the steward; and she was examined by him, it not being proved that he was steward by patent, nor any special custom to warrant it, whether it was good or not; and they all resolved that it was: and Montague said, that he had known it to be so adjudged. Cro. J. 526. pl. 2. Pasch. 17 Jac. B. R. Smithson v. Cage.

2. *But in the king's manors*, a steward cannot be retained by parol, by the mouth of the auditor or receiver; but to make the steward's authority current, especially to make voluntary admittances, *it is necessary to have a patent*, and then by virtue of his patent, without any special authority or particular custom, he may justify the making of any voluntary admittance upon escheats
or

or forfeitures, or the doing of any act belonging to his office; but though he may *ex officio* do those things without special warrant, yet duty binds him, before he makes any voluntary admittance, to inform the *Ld. Treasurer of England*, the *Chancellor*, and *Barons of the Exchequer*, or some of them, for his better direction, and the king's better benefit. *Co. Compleat Copyh. 56. S. 45.*

(G) *One acting as Steward without Authority.*
What Acts of his shall be valid, and how.

1. **I***F under steward holds court baron, and grants copyhold to the tenants without authority of the lord, or high steward, this is good; for it is in full Court; contra where it is done out of Court without such authority. Br. Court Baron, pl. 22. cites 2 E. 6.*

2. The law is not very curious in examining the imperfections of the steward's person, nor the unlawfulness of his authority; for be he an *infant*, or *non compos mentis*, an idiot, or lunatick, an *oulaw*, or an *excommunicate*, yet what things soever he performs as incident to his place, can never be avoided for any such disability, because he performs them as a judge, or at least as custom's instrument; and for *his authority*, though it *proves but counterfeit* if it come to exact trial; yet if in appearance, or outward shew, it seems current, that is sufficient; as if I grant the stewardship of my manor of Dale by patent, and in the patentee's absence, a stranger by my appointment keeps Court, this is authentic. If a grant of a stewardship be made to one, and for some fault or defect in the grant, it is avoidable, yet Courts kept by him before the avoidance shall stand in force, and whatsoever he did as steward is ever unavoidable; as if a *corporation retains*
 [597] a steward by *parol*, and he keeps a Court, punishes offences, decides controversies, takes surrenders, makes admittances, either upon surrenders or descents; these acts, being judicial, shall ever stand for current, though his authority be grounded upon a wrong foundation; for a corporation cannot institute any such officer without writing: and so if the king's auditor or receiver retain a steward by *parol*, he may lawfully execute any judicial act; but things which he performs as custom's instrument, not as judge, such as are voluntary admittances, neither in the retainer by the corporation, nor in this retainer by the king's officers, shall any writ bind; but if a stranger, without the appointment of the lord, or consent of the right steward, or *without any colour of authority*, will on his own head come into a manor, and keep a Court, it seems that the performance of any judicial duty, or the executing of any act whatsoever, will not be warranted, especially if the Court be kept without warning given to the bailiff by precept, according to the custom. *Co. Compleat Copyh. 56. S. 45.*

3. A grant of a stewardship of a manor was to two, afterwards one of them, without the other, granted a copyhold. Manwood Ch. B. in delivering the judgment of the Court, held that this grant of a copyhold by one of them was good; and he took a *diversity* between such grant by a *steward who has colour and no right* to hold a Court, and one that has *neither colour nor right*; for if one that has colour assembles the tenants, and they do their service, what he does is good; as if under steward on the death of the head steward, or the lord's clerk holds a Court without any disturbance by the lord, though he has no patent nor express authority to be steward, because the tenants are not compellable to examine or enquire into the lawfulness of the authority of the steward, neither is he bound to give any account of it to them. Mo. 110, 111, 112. pl. 252. Pasch. 22 Eliz. in the Exchequer. Knowles v. Lucy.

S. C. & P. cited 12 Mod. 471. in the case of Parker v. Kett by Holt Ch. J. in delivering the opinion of the Court, and allowed by him; and he said that the instances mentioned make a colourable steward.—

cited by Holt Ch. J. in S. C. of Parker v. Kett. Ld. Raym. Rep. 661.

4. Acts done by one who keeps a Court as steward *without authority*, if they come in by presentment from the jury, or of necessity, are good, as admittance of heir on presentment, or of one by a surrender to an use, and a presentation of nuisances before him are good; but *acts voluntary*, as grant of a copyhold escheated, are not good. Cro. E. 699. pl. 13. Mich. 41 & 42 El. B. R. Per Fopham in the case of Harris v. Jays.

If a steward *de facto* admits a copyholder it is good, tho' he be not a steward *de jure*. Arg. 2 Lev. 184. Hill. 28 &

29 Car. 2. B. R. in the case of Hippfly v. Tucke.

5. It is agreed, a steward *de facto* may take a surrender, and a steward *de facto* is in truth no steward at all; for he only acts as such, and is in fact and law no steward, yet his act shall be judged *sufficient in case of a formality*, as only to receive a surrender, or be an instrument to pass the estate. Per Holt Ch. J. 12 Mod. 470. Pasch. 13 W. 3. Parker v. Kett.

Ld. Raym. Rep. 660. S. C. & S. P.

(H) Forfeiture of his Office.

1. **T**HE office of a steward may be forfeited three manner of ways. 1st, By abuser. 2dly, By non-user. 3dly, By refuser. 1st, By *abuser*, as if the steward burns the court rolls, or if he takes a bribe to wink at any offence, or uses partiality in any cause depending before him; these and the like abuses will make him subject to a forfeiture. 2dly, By *non-user*, as if the steward by his patent being tied to keep Court at certain times of the year, without request to be made by the lord, fails, and by his failure the lord receives any prejudice, this is a forfeiture. But if the lord be not damnified, then this non-user is no forfeiture. 3dly, By *refuser* the office of a steward may be thus forfeited; if the steward be tried by his patent to keep Court, upon a demand or request to be made by the lord, if the lord demands or requests him to keep a Court, and he fails, this is a forfeiture, though

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though the lord be thereby nothing damnified. Co. Compleat Copyh. 56. S. 45.

(I) *Deputy.* In what Cases the Steward may make a Deputy, and his *Power*.

1. **SOME** have thought that an under steward may be made without special words in the steward's patent authorizing him to make a deputy; but surely since it is an office of knowledge, trust, and discretion, it cannot, unless it be *in cases of necessity*; as if an office of stewardship descend unto an *infant*, he may make a deputy, because the law presumes he is himself incapable to execute it. Co. Compleat Copyh. 57. S. 46.

2. The under steward is the steward's *deputy*, and sometimes appointed by writing, sometimes *by parol*: and the extent of his authority is as great as the steward's own authority, and his office consists in performance of the self-same duties that the high steward himself is to perform; only in this point the power of the steward goes beyond the power of the under steward, that the steward can make an admittance out of Court, and it shall stand good, if entry be made in the court roll that he that is admitted, has paid his fine, and has done fealty; but the *under steward*, though he may take a surrender out of the Court, yet he cannot make any admittance out of Court without special authority or particular custom. Co. Compleat Copyh. 57. S. 46.

S. C. cited by Holt Ch. J. Ld. Raym. Rep. 661. in delivering the resolution of the Court; but said, that the undersigning of the copy in the said case by the Ld.

3. The steward appointed a deputy to keep a Court & ad tradendum certain lands of a deceased tenant to one W. by copy, for life. Afterwards the said deputy commanded one H. his servant, to keep the said Court and grant the said land by copy ut supra, which he did, and the lord of the manor subscribed it and confirmed it. And the jury also found, that the said H. had many times kept the said Court both before and after; and that the custom of the manor was, that the steward or his deputy might take surrenders and grant estates by copy. And the whole Court was clear of opinion, that the grant, for the manor of it was good, especially the lord having agreed to it; and judgment accordingly. Le. 288. pl. 394. Trin. 26 Eliz. B. R. Ld. Dacres's case.

Dacres signified nothing, being after the grant, and could amount to no more than a declaration of his consent, or at most to a confirmation, but could not amount to a grant; and a release or confirmation of copyhold lands is of no avail in law, unless the copyholder be in by admittance, and cited Co. 25. b. But it was necessary, it being a voluntary grant, which without such consent or confirmation had been void.

Le. 289. pl. 395. Trin. 26 Eliz. B. R. S. C. by the name of Burgesse v. Foster, mentions the power of exe-

4. Dean and chapter, lords of a manor, granted the office of steward, &c. to J. S. *ad exequendum per se vel sufficientum deputatum suum*. J. S. made A. his deputy to take a surrender of a baron and his feme, to the use of them for their lives, remainder over in fee, & ulterius faciendum quantum in me est. A. took a surrender from them, upon condition, that the lord should regrant the estate to them for their lives, remainder over in fee. It was agreed,

agreed, that this deputation, pro hac vice, was good; and though the authority to take the surrender was absolute, and A. took it upon condition, yet it was good by reason of these words, *et ulterius ad faciendum, &c.* Cro. Eliz. 48. pl. 2. Tria. 28 Eliz. B. R. Burdet's case.

cuting the office to be per se vel legitimus, suum deputatum eis accepta

bilem; and that afterwards J. S. made the deputation, ad capiendum unum sursum redditionem of such a baron and his feme, &c. and says, note the surrender ought to be of two messuages. but the deputy took two several surrenders from the baron and feme, the remainder over, &c. upon condition to pay a certain sum of money. The whole Court held these proceedings well warranted by the deputation; and judgment accordingly.——4 Le. 215. [599] pl. 348. S. C. reported in the same words.

5. Steward cannot *make a deputy* to exercise his office without * special words in the patent; but if the *office be granted to him and his heirs, or to him and his assigns*, it is sufficient, without other words, to make a deputy; per Coke Ch. J. 2 Brownl. 337. Pasch. 8 Jac. in C. B. in the Earl of Rutland's case.

* Kelw. 44. b. Trin 17H. 7. Per Frowike. Arg. S. P. — 9 Rep. 48. b. Trin. 8 Jac.

in the Earl of Shrewsbury's case [and which is the same case with that of the Earl of Rutland's case], cites this saying of Frowike in Kelway, and that nothing of it was there denied by the Court; and yet in the principal case of the Earl of Shrewsbury, which was, that the Earl of Rutland was made steward of a manor for life, without any words empowering him to make a deputy, it was resolved as this case is, that he might make one; for when the queen granted the office of steward of the manors to him, he bring an earl, so that in respect of the *exility of the office* in a base Court, and also of the *dignity of the person*, it is implied in law for conveniency's sake, that he may make a deputy.——2 Brownl. 330. S. C. by name of the Earl of Rutland's case, accordingly.——4 Le. 243. pl. 397. The Earl of Rutland v. Spencer, S. C. but adjournatur.——S. C. cited Bridgm. 31. in the case of the Bishop of Chichester v. Freeland.——S. P. Co. Compleat Copyh. 57. S. 46.

6. A deputy steward may *hold a Court* with or without taking notice of his principal's name, and it will be good either way; per Holt Ch. J. in delivering the judgment of the Court. 12 Mod. 469, 470. Pasch. 13 W. 3. in the case of Parker v. Kett.

Ld. Raym. Rep. 660. S. C. & S. P. — But 12 Mod. 690. in the case of the City

of London v. Wood. Hill. 13 W. 3. it was said by Holt Ch. J. that the steward of a Court, who has a deputy, cannot sue in the Court before his deputy; and a deputy acts, and of right ought to act, in the name of his principal.

(K) In what Cases the *Act of the Deputy, or Deputy's Deputy* shall be good.

1. **K.** HAD a patent of the stewardship of a manor, to exercise it either by himself, or his deputy; he appointed C. to be his *deputy*, who acted as such for many years; C. by a writing under his hand and seal appointed A. and B. to be his deputy *jointly and severally, only to take a certain particular surrender*, which was done accordingly, and afterwards presented. And per Holt Ch. J. who delivered the opinion of the Court, C. had full power to do what his principal K. might have done. This is essentially incident to a deputy, that one cannot be a deputy to do a single act, nor can a deputy have less power than the principal. That by consequence A. was well authorised by C. as if K. him-

It being objected, that the person to whom the surrender is made, is by the writing named a deputy; and a deputy cannot make a deputy, nor can the

self

power of self had given him the same power, it being to do a particular act. deputy be I Salk. 95, 96. Pasch. 13 W. 3. B. R. Parker v. Kett. more or less confined, than that of his principal. Holt Ch. J. said he agreed there cannot be a deputy of a deputy, nor the power of a deputy abridged; but the word *deputy* in the instrument must be only construed to shew the deputy's intent to empower him only for this particular purpose; and besides there are general words in the instrument sufficient to give authority to accept a surrender. Per Holt Ch. J. in delivering the judgment of the Court. 12 Mod. 470. S. C.——
Ld. Raym. Rep. 658. S. C. accordingly.

But though a deputy steward's grant of an *under deputyship* is void (unless it be to do a particular act) and he had no real authority, yet even that constitution would have given him the colour and reputation of an authority, to act as a steward de facto, and what he does as such is sufficient among the tenants; for they have no power to examine his authority, nor is he to render them an account of it; per Holt Ch. J. 1 Salk. 96. Parker v. Kett.

[600] (L) Joint Stewards. How they may act.

S. C. cited by Holt Ch. J. 12 Mod. 470, 471. in case of Parker v. Kett; and he said, that the one alone had no more power in that case to

1. **A GRANT** of a *stewardship* of a manor was to two jointly, and afterwards one of them, without the other, granted a copyhold. Manwood Ch. B. in delivering the opinion of the Court, held that this grant by one of them was good, because the one having colour by the joint patent to hold a Court, and doing it without the other, the grant is good, though in strictness of law he could not hold a Court without the other. Mo. 110, 111, 112. pl. 252. Pasch. 22 Eliz. in the Exchequer. Knowles v. Lucy.

act without his companion, than if he had not been named at all; yet, because there was a colour and shew of a legal Court, and a surrender made and presented, it was held good.——
S. P. Arg. Vent. 320. in case of ROBINSON v. WOOLLY, cites Mo. 107. Noy's Reports. But the Reporter says, quære that case. [I suppose he means quære where to find that case in Moor or Noy; for it is not at the place cited, but the case intended out of Mo. seems to be the case above.]

So if the King makes two stewards to keep

2. If a man grants the office of *stewardship* to two, the one of them cannot hold a Court alone. Per Anderson Ch. J. Goldsb. 2. pl. 4. Pasch. 28 Eliz. Anon.

Courts, one alone, though with consent of the other, can neither keep Courts, nor grant copies; for they have a joint power. Jenk. 246. pl. 35.

(M) Pleadings.

1. **I**N replevin, where a man makes avowry, or counts for annuity granted for term of his life to be steward of the manors of A. B. and C. and says that he exercised the office, it suffices, though he does not say in all the manors; for it shall be so intended. Br. Count, pl. 62. cites 5 E. 4. 104.

2. A *scire facias* was brought in a writ of annuity granted for life for the exercise of the office of steward for the arrears of a year incurred after a judgment; the defendant pleaded that pending the writ of annuity the plaintiff being requested by the defendant to hold a Court for the said manor, he refused to do it, and this without answering

answering to the arrears incurred before the scire facias; and this was adjudged a good plea. Dyer 377. pl. 28. Trin. 23 Eliz. Anon.

3. *Tenant in common granted an annuity for holding Courts, and he summoned it without his companion, and the grantee refused to hold it; this is no forfeiture, because a void summons. D. 377. Marg. pl. 28. cites 27 Eliz. Hurlestone's case.*

4. Plea in ejectment that the lands were copyhold, and that B. the tenant *surrendered* them into the hands of A. the steward, to the use of C. the defendant, and that C. was accordingly admitted; B. replies, and concludes with *absque hoc, that A. was steward*: and held to be no good issue; for it should be *absque hoc* that B. made any surrender. Cro. E. 60. pl. 45. Mich. 33 & 34 Eliz. B. R. Wood v. Butts. Le. 227. Blagrove v. Wood, S.C. but adjournatur.

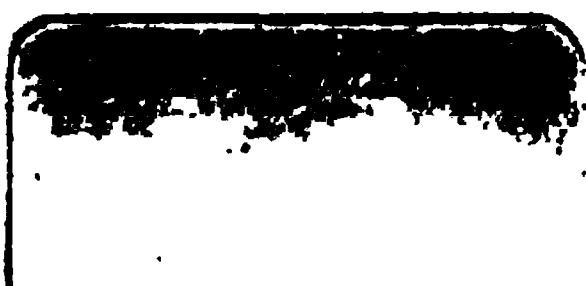
For more of Steward of Courts in general, see Copyhold, Courts, Officers and Offices, and other proper Titles.

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